foundation of the Sabbath" and believed that Sabbath-keeping was especially significant among the Ten Commandments. Ellen G. White, *Life Sketches of Ellen G. White: Being a Narrative of Her Experience to 1881 as Written by Herself; with a Sketch of Her Subsequent Labors and of Her Last Sickness* 96 (1915). To be a faithful member of these religious groups requires the ability to refrain from labor on the Sabbath.

Under the current doctrine, Sabbath observers must depend on their employers' and coworkers' goodwill to be able to swap schedules with other employees if they are otherwise required to work on their Sabbath. More substantial accommodations, such as being permitted to take unpaid time off, typically imposes more than a *de minimis* cost on employers. Religious accommodations that affect co-workers have also been found to create an undue burden. *Bruff v. N. Mississippi Health Servs., Inc*., 244 F.3d 495, 501 (5th Cir. 2001); *Patterson v. Walgreen Co*., 727F. App'x 581 (11th Cir. 2018). Employers, or even an employee's co-workers, with religiously prejudicial or antisemitic motives can camouflage the motive for their refusal to accommodate religious practices, such as Sabbath observance, because they impose "more-than-*de-minimis* undue burdens" under *Hardison*.

The lack of legal protection in workplace settings for one of the central practices of the Jewish faith is a particularly pressing problem because antisemitism in the United States has dramatically increased in the past several years. The Anti-Defamation League Center for Extremism tracked 2,717 antisemitic incidents

in the United States in 2021, the highest recorded since the organization began keeping data in 1979. Audit of Antisemitic Incidents 2021, 5 (2022).[2] The number of incidents has more than doubled in less than a decade, and includes cases of harassment, vandalism, and violent assault. *Id.* at 6.

The Federal Bureau of Investigation's 2021 statistics on hate crimes report that Jews were the group most likely to be the victims of religiously motivated bias-motivated crimes. 2021 Hate Crimes Statistics, United States Department of Justice (2022).[3] Violent attacks on Jews, including the massacre at the Tree of Life Synagogue in 2018, the hostage crisis in a Texas synagogue in 2022, and the shooting of two Jewish men in Los Angeles in February of 2023, highlight the increasing vulnerability of the Jewish community. Richard Winton et al., *Suspect in shootings of two Jewish men in L.A. is charged with federal hate crimes*, Los Angeles Times, Feb. 16, 2023.[4]

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[2] *Available at* https://www.adl.org/sites/default/files/pdfs/2022-05/ADL_2021%20Audit_Report_042622_v11.pdf.

[3] *Available at* https://www.justice.gov/crs/highlights/2021-hate-crime-statistics.

[4] *Available at* https://www.latimes.com/california/story/2023-02-16/extra-security-added-for-synagogues-after-two-jewish-men-shot-in-pico-robertson-in-two-days

A 2022 survey conducted by the American Jewish Committee indicates that 26 percent of American Jews report that they have been victims of antisemitic remarks or conduct during the past year. The State of Antisemitism in America 2022: AJC's Survey of American Jews, American Jewish Committee (2023).[5] The same survey also indicated that 89 percent of Jews feel that antisemitism is a problem in the United States, and 82 percent believe that it is increasing. *Id.* With antisemitism on the rise, it decreases the likelihood that employers will be receptive to Jewish employees who seek to observe the Sabbath.

B. Growing religious disaffiliation exacerbates the uphill battle that minority faiths face in obtaining accommodations.

The United States is becoming simultaneously more religiously diverse and experiencing large-scale disaffiliation from organized religion more broadly, making workplaces increasingly unfamiliar and hostile toward religion. Christopher P. Scheitle & Elaine Howard Ecklund, *Examining the Effects of Exposure to Religion in the Workplace on Perceptions of Religious Discrimination*, 59 Rev. Relig. Res. 1, 2 (2017). *Hardison*'s definition of undue burden allows employers, and even other employees, to exercise tremendous power over religious practices. Relying on the goodwill of em-

[5]*Available at* https://www.ajc.org/AntisemitismReport2022/AmericanJews.

ployers or co-workers to accommodate religious practices could become more fraught as secularizing trends continue.

According to Pew Research Center in 2021, about three in ten Americans are now religiously unaffiliated, with the rate of the religiously unaffiliated growing by ten percent in a decade. Travis Mitchell, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, Pew Research Center's Religion & Public Life Project (2021).[6] Young people ages 18 to 29 are more religiously diverse than older age groups, indicating that the United States is becoming more religiously heterogenous. Robert P. Jones, Natalie Jackson & Diana Orcés, *The 2020 Census on American Religion*, 11 (2021).[7]

Rates of religious literacy in the United States are low, and Americans do not know much about religions other than their own. Stephen Prothero, *Religious Literacy: What Every American Needs to Know—-And Doesn't* 17–22 (2009); Sara Atske, *What Americans Know About Religion*, Pew Research Center's Religion & Public Life Project (2019) (observing that knowledge

[6] *Available at* https://www.pewresearch.org/religion/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/.

[7] *Available at* https://www.prri.org/wp-content/uploads/2021/07/PRRI-Jul-2021-Religion.pdf.

about other religious groups is linked with more tolerant views of them).[8] Americans are likely to encounter different religious views in the workplace, and that can be a cause for conflict. Rachel C. Schneider et al., *How Religious Discrimination is Perceived in the Workplace: Expanding the View*, 8 Socius, 1 (2022).

Incidents of religious discrimination in the workplace are rising at a faster rate than other forms of discrimination. Between 1992, when the Equal Employment Opportunity Commission first started reporting data on discrimination, and 2020, the rate of religious-based discrimination increased 73 percent, while race-based discrimination decreased by 25 percent, and sex-based discrimination declined by 1.8 percent. *Id*. Religious discrimination negatively affects mental health. Zheng Wu & Christoph M. Schimmele, *Perceived Religious Discrimination and Mental Health*, 26 Ethn. Health 963, 976 (2021).

Antisemitism is already prevalent in workplaces and becoming more common. A 2022 study of 11,356 employees, reported in the American Sociological Association's journal *Socius*, found that over half of Jewish respondents reported being discriminated against while at work. *Id.* at 5. A targeted survey of 1,131 hiring managers found that twenty-six percent of those surveyed reported they would be less likely to hire a

[8] *Available at* https://www.pewresearch.org/religion/2019/07/23/what-americans-know-about-religion/.

Jewish applicant; the same percentage claimed they made assumptions about whether candidates were Jewish based on physical appearance, while twenty-nine percent reported that antisemitism is acceptable in their company. ResumeBuilder.com (last retrieved Feb 13, 2023). 1 in 4 hiring managers say they are less likely to move forward with Jewish applicants. *Id.*[9]

Under the *Hardison* standard, not only might employers fail to make serious efforts to accommodate their employees' religious practices, but the employee's co-workers may do the same. *See, Patterson v. Walgreen Co.*, 727F. App'x at 587 (holding that the company was not required to ensure a religious employee could swap their shift with a co-worker or order another employee to work in their place). By allowing undue hardship to be demonstrated by anything more than a *de minimis* burden on coworkers, *Hardison* gives coworkers veto power over the employment of religious minorities.

Courts do not inquire into motives to decide whether co-workers declining to swap shifts or otherwise assist a religious employee is tied to antireligious animus. The "mere possibility of an adverse impact on co-workers" has been found to be sufficient grounds for an employer to deny a religious accommo-

[9]*Available at* https://www.resumebuilder.com/1-in-4-hiring-managers-say-they-are-less-likely-to-move-forward-with-jewish-applicants/.

dation; there does not even have to be a demonstrated impact. *Weber v. Roadway Express, Inc.,* 199 F.3d 270, 274 (5th Cir. 2000).

In *Mann v. Frank,* after another employee refused to fill a Seventh-day Adventist's Sabbath shift, an appellate court found any further effort at accommodation would cause the Adventist's employer undue hardship, even though the employer regularly allowed employees to be excused from work for non-reoccurring secular reasons such as birthdays and anniversaries. 7 F.3d 1365, 1369–70 (8th Cir. 1993). The *Hardison* standard has meant that employees had to secure their own substitutes for days that they missed, which requires tolerant co-workers. *Smith v. Pyro Mining Co.*, 827 F.2d 1081 (6th Cir. 1987), cert. denied, 485 U.S. 989 (1988).

By putting employers and employees in a position where they can effectively choose not to accommodate religious minorities, the standard in *Hardison* raises the real danger that courts will overlook antisemitism and prejudice. There is an inconsistency between how the Court treated religion in *Hardison* and how it urges religion should be treated in Title VII more generally. *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 775 (2015) ("Title VII does not demand mere neutrality with regard to religious practices—that they be treated no worse than other practices. Rather, it gives them favored treatment").

WRITING SAMPLE

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The attached writing sample is an excerpt from a brief completed for Professor Jack Balkin's Constitutional Law course. The brief was based on the *New York State Rifle & Pistol Ass'n v. Bruen*, a case on the constitutionality of restrictions on the concealed carry of handguns which was argued before the Supreme Court shortly before the brief was due. For the assignment, I was not allowed to look at any briefs in the actual case.

Our briefs were defended in oral arguments at the end of the course. The question presented was "whether the restrictions placed on petitioners' concealed-carry licenses violate the Second Amendment." I was instructed to elaborate on the following issues in oral arguments:

1. Looking to the Second Amendment's text, history, and tradition, does concealed carrying in public fall within or outside the scope of the Amendment?
2. Assuming that concealed carrying in public does fall within the scope of the Second Amendment, what is the appropriate standard of review, and how would you apply the standard to the New York law?

I represented the respondent, Bruen, and the state of New York. I chose to use the summary of the case and an excerpt from the section responding to the first issue—on text, tradition, and history— as my writing sample.

No. 20-843

In The
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., et al.,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of New York State Police, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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SUMMARY OF ARGUMENT

Petitioners misconstrue the Second Amendment. The right to keep and bear arms exists only in the home, where the need for self-defense and defense of family and property are at their apex. Though the Second Amendment allows the possession of firearms in this context, the original popular meaning of the Second Amendment and its history indicate that it does not sanction the concealed carry of weapons, which fall outside its scope. States were allowed to make laws pertaining to arms, a power that was essential to maintaining a "well-regulated" militia. In the nineteenth century, when concealable firearms become common, many states pasted restrictions on concealed carry. And as this court has previously stated, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897). In short, New York's restrictions on concealed carry fall outside the ambit of the Second Amendment.

But even if New York's laws were understood to implicate the Second Amendment, the proper cause requirement in New York Penal Law §400.00 would withstand intermediate scrutiny. As the most populated urban area in the United States, New York City's government needs to place restrictions on concealed carry to protect its citizens and law enforcement officers from the risk of harm and death. The imperative to mitigate public safety risks amounts to a compelling state interest that justifies the imposition of a narrowly tailored restriction on Second Amendment rights.

I. The History of Arms Regulation Indicates the Limits of the Second Amendment

A. Regulation Before the Constitution Shows the Longstanding Permissibility of Arms Regulation

The New York regulations here qualify as historical "longstanding regulations" that are presumptively lawful and fall outside the scope of the Second Amendment.

Heller made clear that a historical test determines if a regulation falls within the Second Amendment. As Justice Scalia observed, "traditional restrictions"—defined as those that can be found in the history of American firearms regulations— "go to show the scope of the right," but can never be taken to undermine its fundamental core. *McDonald*, 561 U.S. at 802 (Scalia, J., concurring). They are therefore presumptively lawful.

Historical methodology, he explains, is the "*best means available* in an imperfect world" to restrain the tendency of the judiciary to write their own perspectives into law. *Id.* at 804 (emphasis in original). To change or redefine the understanding of a constitutional right, such history must speak *clearly*: "In the most controversial matters brought before this Court. . . *any* historical methodology, under *any* plausible standard of proof, would lead to the same conclusion." *Id.* at 804 (emphasis in original).

In other words, if *any* historical methodology would show that concealed carry was not publicly understood as a personal right, then this Court should allow New York's laws to stand. Yet petitioners cannot satisfy even this basic standard.

History shows that an unlimited right to concealed carry has not been considered to be part of the Second Amendment's scope. Longstanding law, tradition, and popular understanding

make clear that the governmental regulation of the public carrying of arms existed simultaneously with the idea that there is a right to "keep and bear" them. At the Founding, states had numerous regulations that affected where and when weapons and their accessories could be carried. Indeed, after the passage of the Constitution, numerous states directly banned the concealed carry of weapons. Therefore, the historical materials suggest that concealed carry was not a personal right, and that New York laws cannot qualify as presumptively legal longstanding regulations.

The power of government to regulate the use of firearms in public dates back to the English tradition, where it was common for there to be regulations against carrying weapons outside the home.

The 1285 Statute of Edward I made it a crime to carry swords or other arms in in any manner unless a man was socially prominent. Patrick J. Charles, *The Face of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEV. ST. LOUIS L. REV. 1, 1, 10 (2012). There existed, moreover, a 1308 prohibition by King Edward II on an armed knight going to Croydon before his coronation; a 1310 prohibition from the Sheriff of York that limited knights and nobles from traveling armed; and a 1312 order from the king directing sheriffs in Warwick and Leicester to seize weapons from those armed without the king's permission. *Id*. at 11-12. The famous Statutes of Northampton in 1328 stated "no man great nor small, of whatever condition soever he be . . . to come before the King's justices, or other officers of the King's ministers doing their office, with force and arms, nor bring no force in affray of peace, nor go nor ride armed by night nor day, in fairs, markets, nor in the presence of justices or other ministers" *Statute of Northampton (1328)*, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 209 (Phillip B.

Kurland & Ralph Lerner ed., 2000).

Indeed, the common law is replete with examples of regulations of public carrying of arms. To name but a few, there was a 1334 directive from York's mayor and bailiffs that no one could go armed to fairs or markets; a 1343 direction to London hostels to remind guests that weapons were not allowed in the city; a 1381 proclamation from Richard II of the same; and a reenactment by Henry IV of the Statutes of Northampton in 1405. Charles, *supra* at 13-18. Prohibitions against carrying arms in certain public areas or carrying a weapon without a license were described in John Carpenter's *Liber Albus*, the first book written on the Common Law. *Id.* at 18.

Prohibitions continued into the early modern period. English commentators understood there to be a broad warrant towards the public carrying of arms, and these views appear in Coke's *Institutes and Lawes of England*. Jonah Skolnik, *Observations Regarding the Interpretation and Legacy of the Statute of Northampton in Anglo-American Legal History*, DUKE CENTER FOR FIREARMS LAW (2021). To give just one example: in 1686, in Sir John Knight's case, a man was tried for walking the streets armed with guns, and later entering a church. *Sir John Knight's Case* (1686), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 209 (Phillip B. Kurland & Ralph Lerner ed., 2000. In another example, the English Bill of Rights specified that English subjects could have "arms for their defense suitable to their condition, and as allowed by law." English Bill of Rights (1689). This was understood to mean that the right to bear arms could be restricted by social status and by any relevant other laws.

In North America, after European settlement, colonial governments retained powers to regulate the kinds of weapons that citizens could employ and where they could bear them. A 1623 Virginia law specified that men "shall not go to work in

the ground without their arms and a centinell upon them," and the sentinel was required to have an ignited match, to keep his matchlock at the ready. Weir, *Supra*, at 14. The General Court of Massachusetts Bay specified in a 1645 proclamation that "no pieces shalbe serviceable, in our trained bands, but such as are ether full musket boare, or bastard musket at the least, and none shall be under three foote 9 inches, nor any above foure foote 3 inches in length, and that every man have a priming wyre, a worme, and scourer, fit for the boare of his musket, which we find not required in any former order." *Id.* at 15. This was a militia regulation, but at the time, Massachusetts had no unorganized militia. Nonregulation weapons were not banned, but they did not count for the purposes of being required weapons for militia duty.

During the American Revolution, the nascent polities placed extensive restrictions on the time, place, and kinds of arms that could be used. The 1778 New York militia laws required every militia member to show up for duty with a "good musket or fire-lock fit for service" and at least 16 cartridges "of powder and ball." Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV., 487, 509 (2004). Regulations on gunpowder storage represented a ubiquitous kind of arms control over the entire population. Cornell & DeDino, *Supra*, at 51; Michael Waldman, *The Second Amendment: A Biography* 10 (2014).

Multiple states confiscated the weapons of men who would not swear loyalty oaths to the new United States government. The state also had the power to disarm certain categories of people. A 1776 Massachusetts Act, which was passed at the urging of the Continental Congress, specified that if any man above sixteen years old failed to such an "test of allegiance," he would be disarmed of "all such Arms, Ammunition and Warlike Implements, as by the strictest Search can be found in his Possession or belonging to him."

Cornell & DeDino, *Supra*, at 507.

What these pre-constitutional laws and declarations evidence is a widespread public understanding that governmental regulations that limited where firearms could be carried did not infringe an individual's right to keep and bear arms. The Second Amendment was far from a repudiation of these views: it enshrined them.

B. After the Bill of Rights Concealed Carry was Banned in Many States

Until the modern period, moreover, the notion that the Second Amendment allowed restrictions on concealed carry was well accepted. In the nineteenth century, many states passed restrictions on concealed carrying of firearms. These statutes were necessitated by changing weapons technology, which made concealable pistols cheaper and more ubiquitous. The Derringer, a name that would become synonymous with pocket percussion cap pistols, would first be manufactured in 1825. Before that, the matchlocks and Queen Anne's pistols that existed were notably cumbersome and expensive, hardly the easiest weapons to put in a vest pocket.

These concealed carry laws cannot be attributed to widespread ignorance of the Second Amendment. Americans prized that personal liberty but understood that arms could and should be regulated.

In 1833, Justice Joseph Story declared the right to keep and bear arms "has justly been considered the palladium of the liberties of a republic" because it enabled the people to resist tyrants through force of arms in the militia. Yet he also understood that right to be carefully regulated, as the organized and unorganized militia bearing arms had to be subject to well-placed checks. Story worried that Americans might grow to indifferent to the much-needed "system of

militia discipline . . . from a sense of its burdens, to be rid of all regulation." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 746-747 (1833). While the right to bear arms to defend the home was paramount, Americans knew that keeping guns required laws that guaranteed they would be safely used.

Laws that sought to uphold public safety by preventing people from carrying concealed firearms proliferated. Virginia in 1838, for example, had an act that forbade anyone from carrying a pistol or other weapon "concealed from common observation." Georgia developed even more far-reaching laws, intended to ban certain kinds of concealed weapons. Cornell & DeDino, *supra*, at 514.

Like New York's concealed carry laws, many states allowed its citizens to carry concealed weapons subject to certain conditions. A Tennessee act in 1821 prohibited concealed carrying, except if someone was on an extended journey a significant distance away from their place of residence. This allowed travelers to carry concealed weapons because of their special need but barred the residents of most communities from having them. Ohio's 1859 law prohibited concealed pistols but directed juries to acquit any man "engaged in the pursuit of lawful business, calling, or employment, and that the circumstances in which he was placed at the time were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property, or family." *Id.* at 514.

These laws make clear that Americans understood the Second Amendment's core guarantee of self-defense within the home to be compatible with reasonable restrictions on concealed carry. Indeed, Ohio's law closely resembles the New York law at issue in this case: both laws allowed concealed carry based on demonstrated need. The only difference is that Ohio left this determination to a jury, as a

defense against criminal conviction, whereas New York has deputized its police force to resolve eligibility questions.

Numerous cases from state courts upheld local concealed carry laws. See *State v. Mitchell* 3. Blackf. 229 (Ind. 1833), *State v. Smith*, 11 La. Ann. 633 (1856), *State v. Buzzard*, 4 Ark. 18 (1842*), Fife v. State*, 31 Ark. 455 (1876), *State v. Jumel*, 13 La. Ann. 399 (1858), *State v. Wilforth*, 74 Mo. 528 (1881), *State v. Shelby*, 90 Mo. 302 (1886), *Andrews v. State*, 50 Tenn. 165 (1871), English v. State, 35 Tex. 473 (1872), *State v. Duke*, 42 Tex. 455 (1875), *State v. Workman*, 35 W. Va. 367 (1891).

Laws prohibiting concealed weapons were overturned in only one state. In *Bliss v. Commonwealth,* the Kentucky Supreme Court overruled the conviction of man carrying a sword concealed in a cane, declaring that any law regulating the right to bear arms violated the state constitution. The court ruled that there was no distinction between a law regulating the manner of exercising of a right, and a law that prohibited the exercise of a right entirely. *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822).

While *Bliss* was focused on an edged weapon, and thus is of limited precedential value, the Kentucky Supreme Court's reasoning tracks the logical gaps that pervade petitioner's case. To follow the logic of *Bliss* would require this court to accept the idea that rights exist outside the realm of legal regulations, and that courts must strike down all laws that touch on such rights. This flies in the face of the Court's well-established constitutional jurisprudence. Speech may be a right, but this court has found that restrictions on time, place, and manner to be valid.

Restrictions on concealed carry continued after the passage of the Fourteenth Amendment. Although the Republican framers of the Fourteenth Amendment sought to ensure that freedmen's right to bear arms, they did not

haphazardly eliminate existing gun regulations in the states. Instead, they targeted gun regulations that were racially discriminatory. Importantly, they endeavored to enable Black men's participation in newly formed militias in the South and ensure that they could protect their homes and families. For example, U.S. Attorney General Amos Ackerman, in the Ku Klux Klan trials in Georgia, worked to extend Second Amendment rights to African Americans. Ackerman's key argument was that by robbing African Americans of their arms, the Klan was taking guns supplied to them by the state for militia service. Cornell & DeDino, *Supra*, at 523-524.

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 26, 2023

The Honorable Stephanie Davis
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Dear Judge Davis:

I write to apply for a clerkship with your chambers during the 2024-2025 term. I am a graduate of New York University School of Law where I was an Executive Editor on the *New York University Law Review*. I also have extensive pre-law school experience as a successful public-school teacher.

My goal for my legal career is to serve the interests of working people, and my hope for a clerkship is to learn how to represent these interests most effectively. This commitment to advocacy is closely held and motivates both my enrollment in law school and this clerkship application. In law school, I deliberately sought opportunities that developed my skills by bridging my legal education and my substantial prior professional experience as a classroom educator and organizer. My teaching career imparted to me abilities and habits that will serve me well in busy chambers: I perform well under pressure, I know how to balance competing demands on my time, and I am used to filling many roles simultaneously. I will further develop these skills through professional ethics and labor law fellowships following graduation. With these attributes, as well as my legal research and writing abilities, I believe I can make meaningful contributions to the important work of the court.

Please find attached my resume, a writing sample, and my unofficial transcripts. Letters of recommendation will arrive separately from the following individuals:

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Please let me know if you require any additional information or materials. I am available at 617-506-9203 and by email at donald.mccullough@law.nyu.edu. Thank you very much for your time and consideration.

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Participated in all aspects of traditional labor law at the state and federal levels, including collective bargaining, representation disputes, grievance and arbitration, workers' compensation, unfair labor practice charges, and employee discipline and discharge. Drafted briefs in whole or part for arbitration, labor board, and court proceedings. Contributed research and writing to an article on developments at the intersection of agricultural labor law and the cannabis industry.

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Conducted legal research in the contexts of collective bargaining, union certification campaigns, misconduct allegations and discipline against members, and direct services to locals and members. Wrote and edited case summaries and legal memos. Worked closely with a mentor attorney in a significant school receivership case, researching, writing, and submitting a brief to the New York Commissioner of Education.

Donald "Max" McCullough III

CITY ON A HILL CHARTER PUBLIC SCHOOL, Boston, Massachusetts
History Teacher, August 2014-June 2020
Created curricula and taught World, US, and Advanced Placement US History. Served as academic and community advisor to four homeroom sections. Advised three extracurricular student groups (Gender and Sexuality Alliance, Anime Club, Comic Books and Graphic Novels Club).

Lead History Teacher, August 2017-June 2020
Oversaw the implementation of network-wide curricula in all history courses. Sat on the advisory Academic Committee to improve course offerings, teacher development, and scheduling. Liaised between school administrators and the history department. Managed the history department budget. Led weekly department meetings and monthly professional development.

Urban Teaching Fellow Mentor, August 2015-June 2016; August 2017-June 2020
Modeled effective teaching and planning while guiding teaching fellows through curriculum design, lesson planning, and state licensure. Conducted daily observations of fellows' pedagogy and classroom management, produced daily written feedback, and led weekly one-on-one mentoring and planning meetings. Collaborated with the Fellowship Director to support fellows in their first-year teaching.

Urban Teaching Fellow, August 2013-July 2014
Studied under a mentor teacher before assuming sole teaching and curriculum responsibilities for two sections of World History. Provided daily substitute coverage as needed. Advised two extracurricular activities (Gender and Sexuality Alliance and Music Club).

BOSTON TEACHERS UNION, AFT LOCAL 66, Boston, Massachusetts
Bargaining Committee Member, June 2018-June 2020
Bargained collectively on behalf of school staff through the Boston Teachers Union. Conducted research, surveys, and interviews to inform bargaining proposals. Drafted contract proposals through collaboration with legal counsel and union staff. Represented workers at bargaining sessions with management. Won Boston's first independent charter school union contract in May 2020.

Organizing Committee Member, August 2017-May 2018
Unionized unorganized educators through the Boston Teachers Union. Recruited and trained teachers and staff in union organizing. Executed an adaptable organizing plan, including media strategies, worker mobilizations, and coordinated collection of petition signatures and union authorization cards. Won professional and paraprofessional bargaining unit elections in April 2018.

LEVENTHAL MAP AND EDUCATION CENTER AT THE BOSTON PUBLIC LIBRARY, Boston, Massachusetts
Carolyn A. Lynch Teacher Fellow, May 2017-June 2019
Conducted independent research on the history of early colonial New England. Geo-referenced maps through the Center's digital collection. Designed original lesson plans and supplemental classroom materials, published online by the Center, focusing on geography, map education, and synthesis of diverse historical documents.

BRANDON SHAFFER FOR COLORADO, Greeley, Colorado
Field Organizer, June 2012-November 2012
Recruited and mobilized more than 100 volunteers in Weld County through phone banks, canvasses, and local community and political events. Coordinated voter outreach, education, and get-out-the-vote efforts.

ADDITIONAL INFORMATION

Fellowship at Auschwitz for the Study of Professional Ethics (Law) 2023 recipient. Schulte Roth & Zabel Prize for Excellence in Employment Law 2023 recipient. Peggy Browning Summer Labor Law Fellowship 2021 and 2022 recipient. Advanced Placement Teacher Fellows Scholarship 2017 recipient. Adept with computers and a resourceful legal and archival researcher. Deft at finding the silver lining.

Name: **Donald McCullough**
Print Date: **06/02/2023**
Student ID: **N12949771**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Esther Hong			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	A-
Instructor: John Sexton			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Class, Gender, Politics, and			
Instructor: Stephen Holmes			
David M Golove			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A
Instructor: Kenji Yoshino			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Esther Hong			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Roderick M Hills			
Torts	LAW-LW 11275	4.0	A-
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Stephen Holmes			
David M Golove			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Legal History Colloquium	LAW-LW 11160	2.0	A
Instructor: David M Golove			
Daniel Hulsebosch			
The Law of Nonprofit Organizations	LAW-LW 11276	3.0	A
Instructor: Jill S Manny			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Jonah B Gelbach			
Labor and Employment Law Seminar	LAW-LW 11681	2.0	A
Instructor: Samuel Estreicher			
Labor Law:The Reform Agenda	LAW-LW 11863	1.0	***
Instructor: Samuel Estreicher			
Racial Justice and the Law	LAW-LW 12241	2.0	CR
Instructor: Bryan A Stevenson			
Jurisprudence	LAW-LW 12359	3.0	B
Instructor: David Dyzenhaus			

	AHRS	EHRS
Current	15.0	14.0
Cumulative	45.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A
Instructor: Samuel Issacharoff			
Arthur R Miller			
Property	LAW-LW 11783	4.0	A+
Instructor: Frank K Upham			
Education Advocacy Clinic	LAW-LW 12400	3.0	A
Instructor: Randi Levine			
Matthew Lenaghan			
Education Advocacy Clinic Seminar	LAW-LW 12401	2.0	A
Instructor: Randi Levine			
Matthew Lenaghan			
Upper-Level Reading Group	LAW-LW 12592	0.0	CR
Instructor: James Scott Fraser Wilson			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	57.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2022

School of Law
Juris Doctor
Major: Law

The Law of Democracy	LAW-LW 10170	4.0	A-
Instructor: Samuel Issacharoff			
Richard H Pildes			
European Union law at a time of Nationalist Illiberalism	LAW-LW 10851	3.0	A
Instructor: Grainne de Burca			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Barbara Gillers			
Evidence	LAW-LW 11607	4.0	CR
Instructor: Erin Murphy			
Federal Courts and the Federal System	LAW-LW 11722	3.0	A
Instructor: David M Golove			

	AHRS	EHRS
Current	16.0	16.0
Cumulative	74.0	73.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Employment Law	LAW-LW 10259	4.0	A-
Instructor: Cynthia L Estlund			
Sexuality, Gender and the Law Seminar	LAW-LW 10529	2.0	A+
Instructor: Darren Rosenblum			
Law Review	LAW-LW 11187	2.0	CR
Labor Law	LAW-LW 11933	3.0	A-
Instructor: Wilma Beth Liebman			
Labor and the Constitution Seminar	LAW-LW 12676	2.0	A
Instructor: Cynthia L Estlund			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	87.0	86.0

Staff Editor - Law Review 2021-2022
Executive Editor - Law Review 2022-2023

End of School of Law Record

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write in support of the candidacy of Donald McCullough for a clerkship in your chambers. I first met Max, as we know him, when he was a student in my Civil Procedure section in Fall Term 2020, which was certainly among the most challenging academic environments in my teaching career. In order to comply with Covid health and safety guidelines while still providing some in-person interaction between students and professors, NYU Law School employed a hybrid teaching method, whereby one-third of the students attended in person while the remaining two-thirds participated remotely. There also were those students who participated fully remotely, and Max was among that group. It was in this difficult learning environment that I came to know Max.

Despite the challenging situation – indeed, by any measure - Max excelled in the class, as he continues to do in all his classes. Prior to law school, Max worked for a Boston charter school, and he brought to the classroom the same preparation and engagement he employed as a teacher. His Teaching Assistants reported the same dedication to and involvement with the class and his classmates. I have a longstanding practice of asking my current roster of Teaching Assistants to recommend to me the TA's for the following semester; when it was time for them to recommend the new slate of TA's for the forthcoming year, Max was among those they recommended. Unfortunately, we did not have the opportunity to work together in Civil Procedure; the Law School was hosting a faculty visitor and I volunteered to step aside so the visitor could teach Civil Procedure. I am delighted to report that Max went on to be a Civil Procedure Teaching Assistant for the faculty visitor. Max and I will be working together in Fall Term 2022, when he will be my Teaching Assistant for an advanced undergraduate seminar I teach on the intersection of government and religion.

His many outstanding accomplishments are listed on his resume: Executive Editor of the New York University Law Review, Treasurer for the Education Law and Policy Society, and a Working Group member of the Political Economy Association, among many others; however, perhaps his most significant commitment in law school has been to the High School Law Institute, which allowed Max to bridge his previous career as a teacher with his legal education. The Institute provides enrichment education to high school students on Saturdays throughout the academic year. Max's responsibilities have included coordinating applications and admissions, running compliance with the university, organizing and disseminating curricula, and recruiting and training the law-student teachers who make the program possible. As Max described it very recently, he does this because he has a deep and abiding passion for education and teaching brings him great joy.

Max clearly has the intellectual heft to successfully meet whatever challenges he faces; however, what is less obvious are the qualities that a person demonstrates simply by who they are rather than by what they have accomplished: Max is affable, engaged, and simply someone with whom it is easy and enjoyable to spend time.

I am confident that Max will be an ideal clerk: he is highly intelligent, works diligently, manages his time and energy wisely, and he is a colleague with whom it is a pleasure to work. For these reasons, I am happy to write in support of his candidacy for a clerkship in your chambers.

Sincerely,
John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040

Berkeley Law

Jonah B. Gelbach
Professor of Law
University of California, Berkeley
School of Law
788 Simon Hall
Berkeley, CA 94720
(202) 427-6093 (cell)
gelbach@berkeley.edu

June 13, 2022

RE: Donald "Max" McCullough, NYU Law '23

Your Honor:

I write to enthusiastically recommend **Donald "Max" McCullough** for a judicial clerkship in your chambers.

I know Max (the name by which I know him) because he was my teaching assistant for the 1L civil procedure course I taught in the Fall 2021 semester at NYU Law, where I was a Visiting Professor. Max was selected for this position, along with a handful of classmates, by his own 1L civil procedure professor, John Sexton, following Max's highly successful Fall 2020 performance. I inherited Professor Sexton's teaching assistants when he graciously stepped aside so that I could teach Procedure while visiting NYU.

Max was simply terrific as a teaching assistant. He was highly organized, which is tremendously important for a 1L doctrinal course with 99 students. I had a somewhat idiosyncratic system for teaching the course that semester, with TAs expected to carry out lots of different activities throughout each week, with a premium on meeting deadlines. Some days they attended class, some days they drafted questions for students consider before class, and some days they drafted questions for students to consider after class meetings. TAs also did regular office hours with students and occasional review sessions, and they regularly interacted with me informally about varying course topics.

Max excelled at all of this, regularly exceeding my expectations. He was always available to help me, and it seemed like a daily event that I would see him in the NYU Law courtyard answering students' questions either in person or via Zoom office hours.

One memorable interaction involved the personal jurisdiction classic, *Shaffer v. Heitner*. As one does, I'd gone over class time in discussing other cases in the canon, and I really needed to move on. At the same time, I felt the students should get something more about *Shaffer* than just "read the casebook". So with Max's assistance, I wrote up a Socratic dialogue about the

case, and Max and I recorded a video of it, with Max playing the student's part. We did this remotely, at night, and he did a fantastic job. Many students commented to me about this.

I know that I've written a lot about the course so far, so I want to plant a flag here to emphasize my high regard for Max's legal skills and knowledge. He is highly knowledgeable and just has insightful about procedural law. Although he was never my student in a course, we had numerous discussions about the law, and I am certain those qualities will make him a really outstanding clerk. I am also sure he'll be organized, on point, and easy to work with. He was all of those things in every way as my TA.

I have had the benefit of having many informal interactions with Max not only in the Fall semester when he worked with me, but also in the following Spring semester, as I saw him around the law school frequently. Max is a lovely, thoughtful, and highly personable human being. I would hire him again in a heartbeat, and I am sure that anyone who hires him now will feel the same way.

Worth noting is that Max comes from an unusual background for a high-achieving member of a top law school's class. His family is filled with working class folks rather than scholars or attorneys, and it's very clear this background has shaped Max throughout his life and budding career. He spent eight years in the workforce between college and law school, with most of that time as a high school history teacher. Max is deeply invested in education law and labor law, and in the ways the law affects the interests of working class people. I am sure that after clerking, he'll work in areas related to those interests.

In sum, I am confident Max will make an excellent clerk at either the trial or appellate court level (he is interested in both). I recommend him unreservedly. The judge who hires Max will be well rewarded.

Yours,

/s/ Jonah Gelbach

Jonah B. Gelbach
Professor of Law at Berkeley Law
Visiting Professor of Law at NYU Law (2021-2022 Academic Year)

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A Union of Professionals

Office of General Counsel
ROBERT T. REILLY
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Jennifer N. Coffey
Associate General Counsel

Lena M. Ackerman
Assistant General Counsel

Michael S. Travinski
Associate General Counsel

Jennifer A. Hogan
Associate General Counsel

March 28, 2022

Re: Letter of Recommendation for Donald (Max) McCullough

Your Honor:

My name is Oriana Vigliotti, Esq., and I am Senior Counsel with the New York State United Teachers, Office of General Counsel (NYSUT OGC), located in New York City. It is with great pleasure that I submit this letter of recommendation for Donald (Max) McCullough for a judicial clerkship. Max worked at NYSUT OGC as a law clerk during the Summer of 2021 through a competitive fellowship sponsored by the Peggy Browning Fund. I had the pleasure of working with, and directly supervising, Max and was consistently impressed with his high-quality work product and strong work ethic. Max is by far the best law clerk I have encountered in my 20 years of practice.

NYSUT is a statewide labor organization serving the needs of its more than 600,000 members. NYSUT OGC is the organization's in-house legal department which provides representation and guidance in a variety of settings in both the public and private sectors. During the summer of 2022, the school district of one of our local unions was placed in receivership by the State Education Department Commissioner of Education (Commissioner). The receivership designation forced renegotiation of the local's collective bargaining agreement (CBA) on an extremely truncated timeline and allowed the Commissioner to abrogate certain portions of the collective bargaining agreement in the event the parties did not come to a negotiated agreement within days of the designation. Max and I represented the NYSUT local throughout the receivership negotiations and ensuing litigation before the Commissioner and I can say without hesitation that I could not have done it without Max. Max jumped in immediately and was a valued member of the bargaining team. He was confident enough to ask thoughtful questions of the team and offer answers where appropriate. Max's research and analytical skills are top-notch, and he takes the time to understand the issues and provide research that answers the questions presented with thoughtful analysis. Max researched and drafted portions of the briefs we submitted to the Commissioner and after my review, I was able to simply cut and paste Max's legal research and arguments into the final briefs.

Max's writing skills as a rising 2L were superior to those of many lawyers with whom I have worked over the years. He is able to synthesize arguments concisely and persuasively and he organizes his writing in a thoughtful manner. When writing the facts section of a memorandum or brief Max presents the facts in an easy to understand and thorough, yet concise, manner.

800 Troy-Schenectady Road, Latham, NY 12110-2455 ■ (518) 213-6000
New York State United Teachers
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Max was always timely with his assignments, and he remained in constant communication with me about what was expected and how he could meet my expectations. On Max's first day in our office, I was finalizing a reply brief and I needed immediate research assistance on a specific point of law. Max jumped in without hesitation and provided me with legal citations with concisely drafted parentheticals to support the specific points of law I provided to him. It was a high-pressure assignment and Max handled it calmly and professionally on his first day in our office. After that initial interaction, I knew I could trust Max with important and time-sensitive litigation assignments.

Max was consistently enthusiastic and conscientious with his assignments. During his time with NYSUT, Max stood out because of his excellent research and writing skills, professional demeanor, and pleasant disposition. Further, and perhaps most importantly, Max is a pleasure to work with. He is a genuinely pleasant person and I always looked forward to chatting with him about law school, politics, and his future plans. Max was universally well-liked at NYSUT OGC and, as a result, his assistance on research and writing projects was always in high demand.

I am confident Max will be an excellent judicial clerk. In fact, after working closely with Max all summer and coming to the realization that he was an extraordinary law student and law clerk, I suggested to him that he apply for clerkships. Max will be a wonderful addition to your courtroom. Please feel free to call or email me should you have additional questions, as I would welcome the opportunity to provide more in-depth feedback on Max and his exemplary work in NYSUT OGC.

Sincerely,

Oriana Vigliotti

ORIANA VIGLIOTTI
Senior Counsel

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Re: Donald “Max” McCullough, NYU, J.D. 2023

Dear Judge Davis:

Max McCullough might be the most genial, low-key potential legal superstar I have ever met. So it is my pleasure to recommend him for a judicial clerkship. I often think about whether, if I were a judge, I’d hire this candidate for my chambers. When it comes to Max, the answer is automatic: Yes. Quickly.

Indeed, I have hired Max before. He served as my Research Assistant in the summer of 2021, after first year, and he continued to conduct research for me over the following year. Therefore, I know a lot about his ability to dig, recover, understand, and explain. Among a long list of virtues, one that stands out, for the legal historian seeking research assistance, is *sitzfleisch*. It’s increasingly rare. The market—the intellectual market—wants 280 characters or less, now. That sort of ethic has infected even (especially?) the academy. Some young people only know that world; it’s hardly their fault. Max is different. He enjoys libraries, books, archives, and all the hard work it takes to make sense of what you might find there. He likes a challenge.

Meeting that challenge requires time and intelligence. Max devoted both his time and his sensitive, analytically sharp mind to various tasks. Most of them had to do with confiscation. It is well known that the American Revolutionaries confiscated Loyalist property during the War for Independence. But what do we know about the legalities and the administration of the confiscation project? Surprisingly little. And what exactly was confiscated? One of the remarkably unknown facts of the confiscation project is that one form of property taken, and immediately auctioned, was enslaved labor. People. This was not the main form of property taken. Land was the key asset—millions of acres. It was not perhaps the most useful form of property confiscated. That might have been guns. And it was not the immediate reason or cause of confiscation. Nonetheless, the condemnation and resale of human bodies was part of the way that the revolutionaries paid for independence. We know something about the British project of emancipating enslaved people held by Patriots who fled and joined the British cause. But what about the enslaved people whom Loyalists left behind? I asked Max to help document and calculate the people whom the Revolutionaries took from loyalists and then resold or redistributed. It’s a complex and difficult project, requiring the analysis of many and decentralized archives. But he gave me a large head start. It began with a list of almost 1000 proper names representing people that the state of Virginia confiscated from Loyalists and resold almost immediately. Beyond the human and financial dimensions of this project, there is also the administrative aspect. Classifying Loyalists as such; identifying and surveying their property; adjusting claims for and against those estates; and reselling the remaining corpus—including humans: this was a complicated administrative process for brand new political states and generated surprisingly sophisticated “state” apparatus, just a few years after the Declaration of Independence. Max has been helpful in tracing the construction of this governmental capacity as well.

Max also enrolled in the Legal History Colloquium, which I moderate with a colleague. We invite historians and legal scholars to present works-in-progress. There is a lot of give and take, and some students sit back and allow the professors to dominate. While Max is always respectful, he was always eager to enter the fray—usually to the great benefit of the presenter. As with his research for me, Max was thoughtful and helpful.

I hope it is clear that I think extremely highly of Max. He is genuinely smart: a good reader, a fine writer, and careful and precise when operating on his feet. His law school record after two years is absolutely outstanding. These talents, combined with a first-rate temperament, would make him an outstanding addition to your chambers.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Daniel J. Hulsebosch

Daniel Hulsebosch - daniel.hulsebosch@nyu.edu - 212-998-6132

Donald "Max" McCullough III
63 Whitten St. #1, Dorchester, MA 02122
617-506-9203 | donald.mccullough@law.nyu.edu

Please find below a sample of my academic written work product. This writing sample is an excerpt of the first draft of my Note, which is itself an adaptation of an independent research paper I wrote in my Labor and Employment Law Seminar with Prof. Samuel Estreicher in Fall 2021. The Note has been accepted for forthcoming publication in 2023 in the *NYU Law Review*. The sample is the first of the piece's four sections and represents my own work; it appears as it did before substantial revision in the formal publication process.

Thank you for your time and consideration.

Respectfully,

Max McCullough
Candidate for Juris Doctor 2023

Max McCullough

Quick Hearings and a Strike Against Bureaucratic Delay: An Alternative Administrative Procedure for 10(j) Cases Before the NLRB

Introduction

Union organizing campaigns and collective bargaining are highly dynamic processes that implicate the statutory rights of employees, unions, and employers.[1] Accordingly, the National Labor Relations Act (NLRA or Act) provides for the National Labor Relations Board (NLRB or Board) to petition district courts for injunctive relief to preserve these rights as it more fully adjudicates potential misconduct.[2] Petitions for injunctive relief under section 10(j) of the NLRA are a potentially potent way to protect these rights.[3] As a remedy, however, 10(j) injunctions are not as dynamic as the situations they seek to police. For decades, the administrative procedures

[1] *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (2018) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."); *id*. § 7, 29 U.S.C. § 157 (2018) (enumerating employees' rights); Labor Management Relations Act, 1947 § 1, 29 U.S.C. § 141 (2018) ("Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other . . . .")

[2] NLRA §§ 10(j), 10(*l*), 29 U.S.C. §§ 160(j), 160(*l*) (2018). Section 10(j) provides for injunctive relief at the discretion of the NLRB while section 10(*l*) mandates injunctive relief in the event of certain specified misconduct by labor organizations. The current text of section 10(j) reads:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

[3] *See, e.g.*, NLRB Memorandum GC 21-05, *Utilization of Section 10(j) Proceedings*, from Jennifer A. Abruzzo, General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Aug. 19, 2021) [hereinafter *Abruzzo Memorandum*] ("I believe that Section 10(j) injunctions are one of the most important tools available to effectively enforce the Act. Effective enforcement requires that we timely protect employees' Section 7 right to exercise their free choice regarding engaging in union and protected concerted activities, including organizing and collective bargaining."); Catherine Hodgman Helm, Comment, *The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions*, 7 INDUS. RELS. L.J. 599, 607 (1985) ("Prompt relief also is critical when the union has violated section 8 of the NLRA. . . . [T]he case for section 10(j) relief—no matter what the violation—is a strong one.")

the Board deploys in 10(j) cases have been criticized by both organized labor and management.[4] These failures have contributed to a general sense that the NLRB is falling short in its mandate to protect the rights of workers to organize their workplaces.[5]

One consequence of these criticisms is an effort to reform section 10(j) through the proposed PRO Act, introduced and passed through the House by the Democratic majority in 2021 and currently pending before the Senate.[6] Despite some indication of limited bipartisan support for the measure,[7] given the difficulty of moving policy through the gridlock of a 50-50 Senate[8] and general Republican opposition to the PRO Act,[9] statutory reform is uncertain at best.

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[4] *See, e.g.*, Randal L. Gainer, Note, *The Case for Quick Relief: Use of Section 10(j) of the Labor-Management Relations Act in Discriminatory Discharge Cases*, 56 IND. L.J. 515, 517 (1981) (arguing current 10(j) procedures are too slow and arbitrary for workers and unions, ignoring many meritorious discriminatory discharge claims); James P. Osick, *Compelling Collective Bargaining under Section 10(j) of the National Labor Relations Act*, 36 WASH. & LEE L. REV. 187, 202 (1979) ("*Gissel* situations [under section 10(j)] present serious problems, however, in protecting the legitimate rights of the parties involved, and the present administrative procedures and remedies do not appear capable of providing workable solutions."); Louis P. DiLorenzo, *The Management Perspective: A Management Practitioner's Observations Concerning the Latest General Counsel's Initiatives Regarding the Use of 10(j) Injunctions during Organizing Campaign*, *in* RESOLVING LABOR AND EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 17, 26 (Ross E. Davies ed., 2012) (contending that under current 10(j) procedures, "the employer is effectively deprived of its day in court"); Samuel Estreicher, *Improving the Administration of the National Labor Relations Act Without Statutory Change*, 5 FIU L. REV. 361, 377 (2010) ("[T]he NLRB's remedial authority as practiced seems particularly deficient.").

[5] *See* Charles J. Morris, *A Tale of Two Statutes Redux: Anti-Union Employment Discharges under the NLRA and RLA*, 40 BERKELEY J. EMP. & LAB. L. 295, 297 (2019) (characterizing the enforcement of the NLRA's protections for discharges for union activity as "virtually a total failure").

[6] Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. § 2(h) (2019) (giving statutory priority to injunctive relief in cases of employer violations of employees' section 7 rights under sections 8(a)(1) and (3) of the NLRA and repealing sections 10(k) and 10(*l*) of the NLRA).

[7] Mark Weiner, *John Katko among 5 in House GOP who vote for pro-union bill expanding labor rights*, SYRACUSE.COM (Mar. 10, 2021, 11:15 AM), https://www.syracuse.com/politics/2021/03/john-katko-among-5-in-house-gop-who-vote-for-pro-union-bill-expanding-labor-rights.html (naming five Republican Representatives who voted with the Democratic majority to pass the PRO Act).

[8] *See* Candice Norwood, *With Senate split 50-50, here's what Democrats can and can't do*, PBS NewsHour (Jan. 28, 2021, 12:05 PM), https://www.pbs.org/newshour/politics/with-senate-split-50-50-heres-what-democrats-can-and-cant-do ("Democrats now have a thin majority control in Congress, but passing sweeping legislation still won't be easy."). For an historical example of another evenly divided Senates, *see* SENATE HIST. OFF., *The Great Senate Deadlock of 1881*, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Deadlock_1881.htm (last visited Jan. 7, 2022).

[9] COMM. ON EDUC. & LAB. REPUBLICANS, *The PRO Act: A Radical Union Boss Wish List*, https://republicans-edlabor.house.gov/legislation/pro-act.htm (last visited Jan. 7, 2022) (compiling House Republican and interest group opposition to the PRO Act).

With such legislative solutions polarized and stymied, the potential for change is ripest through administrative reform within the NLRB itself.

Despite years of calls for "substantive revision of the [Board's 10(j)] administrative processes,"[10] the procedure for procuring injunctive relief for violations of workers' and unions' rights has not meaningfully changed since its inception in 1947.[11] But the NLRB has many tools at its disposal to overhaul its procedures in ways that address the concerns of both labor and management. One of the NLRB's most powerful tools is also one of its most underutilized: formal rulemaking.[12]

This essay will argue that the NLRB should utilize its rulemaking authority to promulgate a new administrative procedure for handling 10(j) cases, involving the delegation of the Board's prosecutorial functions to its Regional Directors and the provision of quick evidentiary hearings before an Administrative Law Judge with the final authority to issue an injunctive petition resting with the Board itself.[13] These changes would better utilize the Board's resources, reduce duplicative fact-finding, and align the structure of 10(j) proceedings with other kinds of adjudicatory proceedings before the Board. While 10(j) injunctions can be sought against both unions and employers,[14] it is in the context of alleged employer misconduct that they are most frequently discussed; this essay focuses largely on 10(j) procedures in this context. Part I of this

[10] Osick, *supra* note 4, at 202; *see also* Estreicher, *supra* note 4, at 363 (identifying "changes the NLRB can implement on its own, without statutory amendment, to improve its administration of the NLRA").
[11] *See* Morris, *supra* note 5, at 318–320 (surveying the history of 10(j) relief and its use by various NLRB General Counsels from the 1940s to the 2010s).
[12] 29 U.S.C. § 156 (2018) ("The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. §§ 551 et seq. (2018)], such rules and regulations as may be necessary to carry out the provisions of this Act").
[13] I thank former NLRB Regional Director and former Acting General Counsel Dan Silverman for originating this proposed alternative procedure.
[14] NLRB, *Section 10(j) Categories*, https://www.nlrb.gov/what-we-do/investigate-charges/10j-injunctions/section-10j-categories (last visited Jan. 7, 2022) (listing 15 categories of conduct by both management and labor that may warrant injunctive relief under section 10(j)).

essay describes and evaluates the current Board procedure for handling 10(j) cases, including the current results of ineffective relief under the prevailing scheme. Part II proposes in detail an alternative procedure and discusses how the alternative better implements the purpose of section 10(j). Part III considers the rulemaking authority of the NLRB and argues that implementing the alternative 10(j) procedure through rulemaking would have salutary consequences. Finally, Part IV explores the alternative procedure in practice, taking its effects on the specific category of discriminatory discharge petitions as a case study.

Part I

Section 1 – 10(j) Policy and Current Procedures

Relations between employees, employers, and labor organizations are governed under federal law by the NLRA, originally passed in 1935.[15] Prior to the amendment of the NLRA and the enactment of section 10(j) by the Labor Management Relations Act of 1947 (LMRA or Taft-Hartley Act),[16] injunctive relief in the labor law context already had a complicated history. 19th century organizing and strikes by unions were quashed through the issuance of broad injunctions by courts at the request of management.[17] This practice was criticized as "government by injunction,"[18] and Congress responded by codifying a policy against labor injunctions in the Norris-LaGuardia Act of 1932.[19] The LMRA reaffirmed labor injunctions but cabined such

[15] 29 U.S.C. §§ 151–169 (2018).
[16] Labor Management Relations Act, ch. 120, sec. 101, § 10(j), 61 Stat. 136, 149 (1947).
[17] *See generally, e.g.*, FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930) (providing a comprehensive history of the use and abuse of injunctions against organized labor); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989) (providing in Parts III, IV, and V a succinct history of the labor injunction and efforts to end its use); Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 N.Y.U. L. REV. 462 (2017) (exploring the connections between the policy backlash against the labor injunction and the development of modern civil procedure).
[18] Gainer, *supra* note 4, at 520.
[19] Norris-LaGuardia Act, ch. 90, § 1 , 47 Stat. 70 (1932), 29 U.S.C. 101 (2018); *see also* Gainer, *supra* note 4, at 516, n.5 ("This affirmative grant of jurisdiction [in section 10(j)] was necessary since in 1932 Congress, by means of the Norris-LaGuardia Act . . . had for all practical purposes, eliminated the use of labor injunctions by federal courts.").

requests within the NLRB.[20] The NLRB is charged with implementing the policy of the LMRA "to equalize legal responsibilities of labor organizations and employers,"[21] and section 10(j) "was meant to provide temporary injunctive relief in every case that could not be effectively remedied through the NLRB's lengthy adjudicatory procedures."[22] Crucially, "Congress left the effect to be given section 10(j) to the discretion of the Board."[23]

10(j) injunctive petitions are an offshoot of unfair labor practice (ULP) charges filed with the NLRB in the event of alleged illegal conduct. As such, handling such petitions is governed primarily by the NLRB's ULP Handbook,[24] though the NLRB has also produced a handbook dedicated specifically to 10(j) cases, with additional considerations and procedures.[25] The formal, general NLRB procedures outlined in its Rules and Regulations also shape the proceedings.[26] Under this regime, the NLRB occupies two potentially contradictory positions at once, as both the adjudicator of the underlying ULP charge and the prosecutor of the 10(j) petition seeking to apply a temporary injunction to the underlying ULP charge. This contradiction is the result of the procedure prescribed by the Board itself that culminates in a petition under section 10(j).

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[20] LMRA, *supra* note 16; *see also* Gainer, *supra* note 4, at 521–22 (noting that the LMRA Congress favored increased use of injunctions against unions to resolve labor disputes and "was forced by the dynamics of the legislative process to accede to the demands of the prolabor minority that only the Board be given the authority to petition for temporary injunctions and that the Board be allowed to seek injunctions against employer unfair labor practices" (citation omitted)). For comprehensive accounts of section 10(j)'s legislative history, *see generally id*. at 518–22; William K. Briggs, *Deconstructing Just and Proper: Arguments in Favor of Adopting the Remedial Purpose Approach to Section 10(j) Labor Injunctions*, 110 Mich. L. Rev. 127, 142–49 (2011).

[21] S. REP. NO. 105, 80th Cong., 1st Sess. 1 (1947), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 407 (1974).

[22] Gainer, *supra* note 4, at 516.

[23] *Id*. at 522.

[24] NLRB, CASEHANDLING MANUAL FOR UNFAIR LABOR PRACTICE PROCEEDINGS Vol. 1, §§ 10310–10320 (2021) [hereinafter CASEHANDLING MANUAL].

[25] NLRB, SECTION 10 (J) MANUAL USER'S GUIDE (2002) [hereinafter 10(J) MANUAL].

[26] NLRB Rules and Regulations, 29 C.F.R. §§ 101–103 (2021) [hereinafter Rules and Regulations].

Section 8 of the NLRA outlines the types of conduct that constitute ULPs.[27] Section 8(a) describes employer violations, actions which undermine the rights of workers and unions set out in section 7 of the Act.[28] When a union or worker alleges that an employer has committed a ULP, they must file their charge with the NLRB Regional Director for the region in which the offense took place.[29] Charges are investigated by a Board agent acting in a neutral capacity,[30] and the Regional Director uses the Board agent's report to make the initial determination whether the charge has merit and whether to issue a complaint.[31] This prefatory decision whether or not to issue a complaint can be reviewed by the General Counsel, since the complaint "constitutes the exercise of the General Counsel's final authority."[32] This complaint is then litigated before an Administrative Law Judge (ALJ) with the Regional Director acting in a prosecutorial capacity on the behalf of the General Counsel.[33] The ALJ's decision can be appealed to the Board itself which maintains final adjudicatory authority in the administrative process.[34]

Within this process, the procedure for considering and seeking injunctive petitions in 10(j) cases unfolds very differently. The ULP Manual instructs that "[c]ases raising potential 10(j) and 10(l) injunctive relief should be identified as soon as possible *after the filing of the*

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[27] 29 U.S.C. § 158.
[28] *Id*. §§ 158(a), 157.
[29] Rules and Regulations, *supra* note 26, §§ 102.9, 102.10; CASEHANDLING MANUAL, *supra* note 24, §§ 10018.2, 10018.3. *See also* NLRB, *Unfair Labor Practice Process Chart*, https://www.nlrb.gov/resources/nlrb-process/unfair-labor-practice-process-chart (last visited Jan. 7, 2022) (representing the steps in the ULP process as a flowchart).
[30] CASEHANDLING MANUAL, *supra* note 24, §§ 10050–10070.
[31] *Id*. § 10068.3.
[32] *Id*. § 10260 (citing section 3(d) of the NLRA); *see also* Rules and Regulations, *supra* note 26, § 102.19 (outlining the charging party's process for appealing to the General Counsel a Regional Director's determination not to issue a complaint).
[33] *See* CASEHANDLING MANUAL, *supra* note 24, §§ 10380, 10380.3 ("As counsel for the General Counsel the trial attorney represents the public's interests by prosecuting the complaint on behalf of the General Counsel, under the direction of Regional Office management and supervision."); Rules and Regulations, *supra* note 26, §§ 102.15-102.51 (explaining how formal proceedings are instituted by the Regional Director). *See also Unfair Labor Practice Process Chart*, *supra* note 29.
[34] Rules and Regulations, *supra* note 26, §§ 102.45-102.50 (detailing how ALJs' decisions are transferred to the Board for final adjudication and enforcement and how parties may file exceptions to ALJs' decisions with the Board).

case."[35] The Regional Director may consider 10(j) injunctive relief upon the request of the charging party or sua sponte.[36] Further, the Regional Director need not wait until she has issued a determination on the merits of the charge to consider or recommend injunctive relief, though pursuing an actual 10(j) petition for injunctive relief before the courts does require a complaint to have already been issued.[37] Here, the similarities between the 10(j) process and the underlying ULP process diverge. If the Regional Director determines that injunctive relief is merited, she must submit a memorandum to various bureaucratic entities within the NLRB:[38] The General Counsel,[39] the Division of Advice,[40] the Injunctive Litigation Branch,[41] and ultimately the Board itself will weigh in on the Regional Director's recommendation if it is supported by the General Counsel.[42] The Regional Director makes a "paper case," usually with supporting evidence limited to affidavits, to the Board, which does not formally hear management's response to the recommendations.[43] The Board may then authorize the pursuit of 10(j) relief, at which point the Regional Director must file the 10(j) petition in district court within 48 hours.[44] The petition will then be litigated and the court will either grant or deny the petition.[45]

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[35] CASEHANDLING MANUAL, *supra* note 24, § 10027 (emphasis added).
[36] *Id*. § 10310
[37] *See id*. § 10310.3 ("If the complaint has not issued by the time the Region's 10(j) recommendation is prepared, the Region should not delay submission of its 10(j) recommendation."); *but see* 10(J) MANUAL, *supra* note 25, § 5.1 ("The statute provides that the Board may petition a district court for temporary relief 'upon issuance of a complaint.' Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.").
[38] 10(J) MANUAL, *supra* note 25, § 5.0.
[39] *Id*. § 5.2
[40] *Id*. § 5.3
[41] CASEHANDLING MANUAL, *supra* note 24, § 10310.3.
[42] 10(J) MANUAL, *supra* note 25, § 5.5.
[43] *See* DiLorenzo, *supra* note 4, at 26 (criticizing the lack of opportunity for management to present evidence at the administrative stages of a 10(j) case). For examples of judicial skepticism towards these "paper cases," see *infra* note 93 and accompanying text.
[44] 10(J) MANUAL, *supra* note 25, § 5.5.
[45] *See* Briggs, *supra* note 20, at 129–35 (outlining the judicial standards applied when weighing 10(j) petitions); Gainer, *supra* note 4, at 534–38 (criticizing the judicial standards for 10(j) injunctive relief). *See also generally* Jonathan M. Turner & Jesse M. Koppin, *Discovery in NLRA Section 10(j)* Proceedings, 27 A.B.A. J. Lab. & Emp. L. 385 (2012) (discussing procedures developed by district courts for hearing 10(j) petitions).

Section 2 – Evaluating Current Practice

This current NLRB procedure has many shortcomings which emerge when it is evaluated in different ways: by judging the procedures themselves, by considering how 10(j) petitions play out in the courts, and by reviewing the current prophylactic effects (or lack thereof) of injunctive relief as a remedy under the NLRA.

First, the nature of the Board's current practice is inherently awkward, requiring the Board to balance 10(j) cases on two parallel tracks. The dual, prosecutorial-and-adjudicatory role for the Board is not in itself improper and in fact is provided for by statute.[46] However, this procedure is inefficient and ineffective for several reasons. First, the involvement of so many subdivisions within the NLRB creates bureaucratic delay.[47] Second, the NLRB is forced to rely only on its agents' affidavits and written reports in determining whether to authorize a 10(j) petition; the persuasive power of these affidavits have been questioned by both management attorneys and courts.[48] Finally, this structure produces duplicative fact-finding, since both the district court hearing the 10(j) petition and the ALJ hearing the underlying ULP must establish independent records on which to base their decisions.[49]

Second, the results of 10(j) petitions once they reach the courts also reveal the current system's failings. Between 2010 and 2021 the NLRB fully litigated 147 injunctive petitions

[46] *See* 29 U.S.C. § 153(d) (2018) (establishing the General Counsel under the Board and assigning to her a prosecutorial role in Board proceedings); *id*. § 160(b) (establishing the Board's role as adjudicator and modeling its proceedings on the rules of civil procedure in the district courts); *id*. § 160(e) (granting the Board powers to pursue enforcement of its decisions through the courts of appeals); *id*. § 160(j) (specifically granting the Board powers to seek injunctive relief through the district courts).
[47] Phone Interview with Daniel Silverman, former Acting General Counsel, NLRB, and former Regional Director for Region 2 (Dec. 1, 2021) (on file with author). *See also infra* notes 55–58 for the deleterious effects of such delay.
[48] *See* DiLorenzo, *supra* note 4, at 26 (criticizing these affidavits). *See also infra* note 93 and accompanying text for judicial skepticism of NLRB 10(j) affidavits.
[49] *Cf.* Turner & Koppin, *supra* note 45 (providing examples of the ways courts shape their fact-finding and limit discovery as they hear 10(j) petitions); Rules and Regulations, *supra* note 26, § 102.45 (outlining the record ALJs are required to produce in their adjudications). *See also* Interview with Daniel Silverman, *supra* note 47 (characterizing this duplicative fact-finding as needlessly delaying resolution of 10(j) cases).

before district courts.[50] The average 10(j) petition was authorized 240.5 days after a charge was filed with the Regional Director.[51] Once the petition was authorized, courts on average took 108.7 days to reach a decision.[52] Speedy relief this is not—10(j) injunctions take almost a year to issue, if they issue at all. During the same period, district courts denied 37.07% of the 10(j) petitions that reached their dockets; district courts in two circuits, the Fifth and Eleventh, denied every 10(j) petition they considered.[53] While some of this failure rate may be accounted for by inconsistent and controversial standards applied to 10(j) petitions in different circuits,[54] some of the blame rests on the procedure itself.

In the last decade, petitions have been denied on grounds of delay, failure to show irreparable harm, and the balance of equities. Courts cited administrative delay as at least one reason for denying injunctive relief in 30% of denials since 2010.[55] Delay also comes up in denials for other reasons, such as when the passage of time has changed circumstances so

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[50] Publicly available data aggregated from *10(j) Injunction Activity at the National Labor Relations Board*, NLRB, https://www.nlrb.gov/what-we-do/investigate-charges/10j-injunctions (last visited Jan. 7, 2022) [hereinafter *10(j) Injunction Activity*] (on file with author). During this same period, 175 additional cases were settled after a petition was authorized, 16 petitions were withdrawn after being authorized, and as of January 7, 2022, eight petitions seeking injunctions are pending before the courts. *Id*. I thank Bill Baker for sharing his December 2020 aggregation of these numbers, which served as the basis of my own data.

[51] *Id*.

[52] *Id*.

[53] *Id*. This percentage represents 92.5 petitions granted to 54.5 denied. *Id*. These numbers reflect both the relatively small number of petitions that are brought as well as the fact that some petitions were granted in part and denied in part. For an example of one such mixed-result case, *see* Overstreet ex rel. NLRB v. NP Red Rock, LLC, No. 2:20-cv-02351-GMN-VCF, slip op. (D. Nev. July 20, 2021) (granting a *Gissel*-type injunctive bargaining order but denying reinstatement of two fired union supporters).

[54] The actual effect of the judicial standard applied is difficult to conclusively state. *Compare 10(j) Injunction Activity*, *supra* note 50 (finding that, between 2010 and 2021, courts applying the equitable principles standard rejected 33.81% of petitions while those applying the remedial purpose standard rejected 45.24% of petitions), *with* Briggs, *supra* note 20, at 130 ("As a practical matter, the remedial purpose approach results in greater judicial deference to the Board's determinations than the equitable principles approach.").

[55] *10(j) Injunction Activity*, *supra* note 50. For an example of a petition at least partly denied on the basis of delay, *see* Diaz ex rel. NLRB v. Hartman & Tyner, Inc., 2012 U.S. Dist. LEXIS 92459, at *11 (S.D. Fla. June 29, 2012), *aff'd*, 2013 U.S. App. LEXIS 7555 (11th Cir. Apr. 16, 2013) ("The Board then waited more than four months [six months after the terminations at issue] before petitioning the Court for injunctive relief. . . . At this point, it is highly questionable 'whether an order of reinstatement would be any more effective than a final Board order.'" (citation omitted) (emphasis in original)).

dramatically that injunctive relief is not likely to return parties to the status quo,[56] when the long unavailability of relief has decreased workers' interest in reinstatement,[57] or when purported entrepreneurial decisions by management have shifted the balance of equities against injunctive relief meant to restore the status quo.[58] The fact that 37.9% of recent decisions denying 10(j) petitions cite failure to show irreparable harm as a reason for denial also suggests that the Board's current procedure falls short in screening for truly meritorious claims and anticipating or responding to management defenses before the district courts.[59]

Finally, the prevalence of discriminatory discharge of union supporters, a kind of violation most amenable to remedy by 10(j) injunctions, demonstrates the normative failure of 10(j) injunctions as a prophylactic measure. Terminations in the midst of organizing and collective bargaining implicate not only the rights of the fired worker,[60] but also of the union that seeks to represent all of the workers, since "the discharge of active and open union supporters risks a serious adverse impact on employee interest in unionization and can create irreparable harm to the collective bargaining process."[61] In other labor contexts, injunctive relief for

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[56] Cowen ex rel. NLRB v. Mason-Dixon Int'l, No. 2:21-cv-05683-MCS-JC, slip op. at 11 (C.D. Cal. Aug. 27, 2021) ("[T]he Court doubts that an injunction would return the parties to the status quo ante given . . . the magnitude of changed circumstances since the alleged unfair labor practices occurred. . . . The Compton facility has been closed for over a year and a half; the Unit's former positions no longer exist.").

[57] *Id*. at 10 ("The Court further questions Petitioner's evidence that the dismissed drivers remain interested in reinstatement."); McKinney ex rel. NLRB v. Citmed Corp., No. 17-0234-KD-M, slip op. at 7 (S.D. Ala. June 2, 2017) ("Speculation that the employees may move away or otherwise be unavailable for reemployment should the Board render a favorable decision, does not weigh in favor of granting the extraordinary remedy of an interim injunction requiring reinstatement of the discharged employees."). *See also* Helm, *supra* note 3, at 604 (noting the Aspin and Stephens-Chaney studies that found acceptance rates for reinstatement declined the longer they were offered after termination, but that "nobody refused reinstatement when the case was settled in less than a month").

[58] *Mason-Dixon*, slip op. at 13 (finding that a company's subsequent investments in shifting its business towards an owner-operator model, as opposed to an employee model, meant reinstatement "would impose significant economic harm" on the company and tipped the balance of equities in favor of denying injunctive relief).

[59] *10(j) Injunction Activity*, *supra* note 50; *see, e.g., NP Red Rock*, slip op. at 18 (finding legitimate, nondiscriminatory reasons for failure to recall union supporters after COVID-19-related layoffs during an organizing campaign, despite Board arguments that such failure amounted to discriminatory discharges).

[60] NLRA § 7, 29 U.S.C. § 157 (2018)

[61] Frankl ex rel. NLRB v. HTH Corp., 650 F.3d 1334, 1363 (9th Cir. 2011); *see also* Helm, *supra* note 3, at 605 ("[Not only the wrongfully terminated worker,] but also . . . his fellow employees may be injured if he is not reinstated. His failure to return to the workplace may chill the exercise of their section 7 rights." (footnote omitted)).

discriminatory discharges has succeeded in largely eliminating unlawful terminations all together.[62] And yet the NLRA has permitted an "epidemic" of unlawful terminations to overfold.[63] While exact numbers are difficult to ascertain, there is without question a significant risk to workers that they will be unlawfully fired for participating in union activity.[64]

This cavalier attitude towards organizing workers' rights in part reflects the fact that "[a]n employer . . . who violates the [NLRA] can rest easy in the knowledge that he can, if he chooses, avert punishment for a very long time."[65] 10(j) injunctions, as they are currently utilized, are not effective at avoiding the frustration of the NLRA's purposes by the NLRB's own procedures and are simply not enough to convince employers that they will face timely accountability and corrective action in the event they violate the law by firing workers for union activity. This fact would further suggest that 10(j) injunctions are similarly ineffective in discouraging other types of the wide range of misconduct they are meant to dissuade.

Part II

The current way 10(j) injunctive petitions are processed by the NLRB is "unique" in the way that it does not separate the General Counsel and the Regional Directors from the Board on

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[62] *See generally* Morris, *supra* note 5 (discussing the success of the Railway Labor Act's injunctive relief provisions in reducing discriminatory discharges of union supporters and comparing the NLRA unfavorable to the RLA).
[63] *Id*. at 296.
[64] *See id*. at 300–05 (finding that more than 800,000 workers were awarded back pay for discriminatory discharges for union activity since the NLRA's passage and noting the deficiencies in such data); Samuel Estreicher and Jeffery M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C L. REV. 343, 348 (2014) (collecting scholarship on terminations without cause and noting the statistical difficulties). For a union-side study of wrongful terminations for union activity, see CELINE MCNICHOLAS, MARGARET POYDOCK, JULIA WOLFE, BEN ZIPPERER, GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., UNLAWFUL (2019) ("[O]ne out of five union election campaigns involves a charge that a worker was illegally fired for union activity.").
[65] Helm, *supra* note 3, at 599. *See also id*. (noting that in 1980 the median time between the filing of a ULP charge and the circuit court's final decision on the charge was 969 days); Estreicher, *supra* note 4, at 371–72 (documenting the time that elapses between various stages of 10(j) cases); NLRB Memorandum GC 19-02, *Reducing Case Processing Time*, from Peter B. Robb, General Counsel, to All Division Heads, Regional Directors, Officers-In-Charge, and Resident Officers (Dec. 7, 2018) (noting that since the 1980s, the average time between just the filing of a meritorious ULP charge and the issuance of a complaint by a Regional Director increased from between 44 and 55 days to 128 days by 2018).

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Please find below a sample of my written work product. This sample is a brief I drafted for a partner attorney at Pyle Rome Ehrenberg PC during my 2022 Peggy Browning Fellowship. I was charged with researching and writing the brief after attending a virtual arbitration hearing between the union local and the hotel employer. The draft represents my own work and has been edited by me for length and anonymity. It is shared with the permission of Pyle Rome's managing partner, Al Gordon O'Connell.

Thank you for your time and consideration.

Respectfully,

Max McCullough
Candidate for Juris Doctor 2023

THE LABOR RELATIONS CONNECTION, INC.
BEFORE ___, ESQ.

___, LOCAL ___, Union v. THE ___ HOTEL, Employer	Gr. #___ –	Provision of morning coffee and breakfast

BRIEF OF THE UNION

I. INTRODUCTION

For as long as the workers at The ___ Hotel ("the Hotel") can remember, their employer provided them with free breakfast in their cafeteria in the morning. Shortly after a three-month strike concluded in November 2019, the Hotel closed because of the COVID-19 pandemic. Upon return, bargaining unit members of ___, Local ___ ("the Union") were no longer provided any food or beverages for breakfast in the morning. This unilateral change violates the collective bargaining agreement ("CBA") between the Hotel and the Union.

The Hotel's representative claimed that these breakfast meals were never provided but offered no evidence at hearing. These claims are at odds with testimony by the Union's three witnesses, who were consistent both in their recollection of what options were available for breakfast and that breakfast was available daily. Since the Hotel submitted no evidence on the record, it is thus uncontradicted that, before the COVID-19 pandemic, workers enjoyed bagels, other assorted breads, cereal, milk, coffee, tea, sugar, creamer, peanut butter, jelly, and cream cheese during breakfast hours.

The Hotel also raised arbitrability as a defense. This late-raised issue was again unsupported by any evidence other than the date of the grievance. The Union representative who filed the grievance, ___, testified without contradiction that she waited to file the grievance because General Manager ___ repeatedly assured her that he was working with the Chef to restore breakfast. While the Union agreed to certain contract waivers during the declared public health emergency stemming from the pandemic—including permitting the Hotel to offer a meal stipend along with grab-and-go options or no meals at all—the Hotel failed to provide breakfast to its workers well past the expiration of these waivers and after Shop Steward ___ provided General Manager ___ an opportunity to restore this benefit. Accordingly, every day that passes without food and beverages in the morning, the Hotel has violated Article 10 of the CBA, which ensures that "previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued." [UX 1, p. 17.][1]

For these reasons, as further explained below, the Union respectfully requests that the Arbitrator find that the Hotel had a past practice of providing breakfast to its workers and that it has violated the CBA by failing to provide it since reopening in August 2021.

II. ISSUE

The parties could not stipulate to an issue at the hearing. The Union proposes that the issue should be:

Did the Hotel violate the parties' collective bargaining agreement by failing to provide breakfast consistent with prior practice? If so, what shall be the remedy?

III. RELEVANT PROVISIONS OF THE PARTIES' CBA

[1] As used herein, UX shall refer to Union Exhibits and EX shall refer to Employer Exhibits.

Article 10
Meals

Meals All regular employees shall be entitled to one meal without charge for each shift worked, which shall be consumed on the premises for the convenience of the Employer. The value of such meals shall not be computed as income for tax purposes, so long as such exclusion is permitted by law.

If any employee works a split shift, i.e. eight hours within ten hours, then said employee is entitled to two meals.

Any other previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued. [UX 1, pp. 17–18.]

Article 19
Grievance Procedure

Any differences, disputes or grievances relating to the interpretation of this Agreement which arise during the term of the Agreement shall be disposed of as provided by this grievance and arbitration procedure.

No grievance shall be considered under the grievance procedure unless it specifies the nature of the grievance in writing to the Employer within thirteen (13) days after the circumstances giving rise to when the grievance first occurred or within thirteen (13) days after the date when the grievant reasonably should have known the grievance exists. [UX 1, pp. 23–24.]

IV. FACTS

a. Before the Strike and the Pandemic, the Hotel Consistently Provided Breakfast Options in the Staff Cafeteria for Its Employees Who Work in the Morning

Multiple Hotel employees testified that breakfast was consistently available to them before 2019. While each person's memory of the specific items differed to some degree, the core breakfast options were consistent: bagels and breads with various spreads like cream cheese, peanut butter, and jelly; two thermoses of regular and decaf coffee, along with sugar, creamer, and hot water for tea; and cereal with milk. These items were set out in the staff cafeteria and were available throughout the morning. Room Attendant and Union Shop Steward ___ further testified that the breakfast was set up as a self-serve buffet, with temperature-sensitive items on

ice, cups and utensils available nearby, and coffee thermoses set up next to the cafeteria's soda machine.

These food items were available to employees all morning. Banquet Server ___ testified that the cafeteria was open early and breakfast was available even when he arrived to work at 5:30AM. Room Attendant ___ testified to similar effect, stating that when she would arrive to the cafeteria at 7AM before her 8AM shift, she found the usual breakfast options. These items would be available until the cafeteria was prepared for employees' lunch in the late morning.

Various employees were responsible for preparing breakfast. Room Attendant ___ noted that when she had previously worked in In-Room Dining and had arrived at 5:30AM for her shifts, she would sometimes make the coffee for staff breakfast. She also recalled that if someone else made the coffee before her, they would write down the time the coffee was brewed on the coffee thermos for reference. Room Attendant ___'s testimony also reflects this shared responsibility, as she recalls the Chef, the Kitchen Steward, and various In-Room Dining employees brewing coffee and putting out the breakfast items.

b. <u>After the Strike and the Onset of the COVID-19 Pandemic, the Hotel Has Not Provided Any Breakfast to Employees</u>

Hotel employees went on strike in the fall of 2019 for 79 days, concluding the strike in November. [UX 2.] Employees returned to work for only a few weeks before the COVID-19 pandemic caused further disruptions. Occupancy rates fell through January and February 2020 and the governor declaring a state of emergency in March 2020, leading to a temporary closure of the Hotel. To address the public health concerns the pandemic created and reduce the risk of transmission as the Hotel more fully reopened for business, the Hotel and the Union signed a Memorandum of Understanding in September 2020. [EX 1.] To facilitate a gradual reopening

and account for the requirements of the Governor's State of Emergency, this MOU included several contract waivers, including one permitting the Hotel to offer $10 meal credits in lieu of actual meals. [*Id*.] These waivers were temporary and, after the parties agreed to extend them, expired at the end of the declared State of Emergency in July 2021. [*Id*.]

The Hotel reopened slowly in response to the changing conditions of the pandemic and the Union and Hotel endeavored to work together to restore service. The parties reached an agreement in June 2021 to eliminate the $10 stipends in lieu of meals and resume actual meal service in the reopened staff cafeteria, first five days a week and later seven days a week as the Hotel's restaurant resumed operations. [EX 2.] Lunch and dinner were provided during the hours of 11AM–2PM and 4PM–6PM, respectively. [*Id*.]. The Hotel complied with this agreement.

This agreement did not address the morning. The Hotel never resumed providing food and drink for breakfast. Room Attendant ___, Room Attendant ___, and Banquet Server ___ were absolutely unified in their testimony on this point: No breakfast has been provided whatsoever since staff meals recommenced, and the staff cafeteria is now open, but completely empty, in the morning.

c. The Hotel Responded to Union Inquiries about the Provision of Breakfast with Evasion and Delay

During the partial and staggered reopening of the Hotel, Room Attendant ___, acting in her capacity as Union Shop Steward, approached Hotel General Manager ___ several times to discuss the failure of the Hotel to resume its breakfast for employees. These conversations took place between June and November 2021 and culminated in the instant grievance after months of evasion and obfuscation by the Hotel.

___ testified without contradiction that the first few times she asked, ___ told her that he would speak to the Chef about restoring breakfast. He stated this was because parts of the Hotel's food service operations were still closed or in the process of reopening. ___ credited ___'s assurances that he would speak to the kitchen and resolve the issue. But as ___ continued to inquire over days and weeks into the Hotel's persistent failure to provide breakfast, ___'s position shifted. ___ then claimed not to remember that breakfast had ever been provided. Following this final conversation, and the realization that the Hotel had neither made plans as part of its reopening to provide breakfast nor intended to resume its prior practice, ___ filed this grievance on November 18, 2021. [UX 3.]

V. DISCUSSION

a. This Grievance Is Timely and Arbitrable

The Hotel's claims that the Union was untimely in filing this grievance are both procedurally improper and without substantive merit. Accordingly, the Arbitrator must find that the grievance was timely filed and decide this case on its merits.

1. The Hotel Waived Its Right to Raise a Timeliness Objection by Failing to Raise It in the Grievance Proceedings

Issues of timeliness must be raised early in the grievance process, or such objections will be deemed waived. *See, e.g.*, *Crestline Exempted Village Schools*, 111 LA 114, 116 (Goldberg, Arb. 1998) ("It is a well understood arbitration principle that timeliness issues must be raised early in the grievance process . . . . The purpose for the rule is to favor the hearing of grievances on their merits . . . ."); *Liquid Transporters*, 99 LA 217 (Witney, Arb. 1992) (noting that arbitration is not the place to raise timeliness issue for first time and proceeding to hear the grievance on the merits), *cited in* Elkouri & Elkouri, How Arbitration Works at 5.7.A.iii, n. 177

(8th ed., May ed. 2016). A party waives its right to object to a grievance's arbitrability if it "does not timely object to the arbitrability of the grievance, but instead waits until the hearing or shortly before the hearing to object." Elkouri & Elkouri at 5.3.B.

Here, the Hotel did not raise any timeliness or other procedural objection to the grievance before arbitration. The Hotel's own written account of the Step 1 grievance procedure reads:

> The Hotel and Union met via zoom on 12/1 to discuss grievance # . The Hotel's position is that we are honoring the CBA, article #11, by "...providing one meal without charge for each shift worked..." The Hotel asked the Union for evidence that a morning meal was provided. The Hotel also asked the Union specifically what was provided in the morning and the Union provided the following list; Coffee, cream cheese, jam, peanut butter, milk, toast, bagels whatever bread was available, tea and sugar. The Hotel is waiting for evidence from the Union that morning food and beverage was provided. (Evidence other than the memories of employee)
>
> Again, the hotel feels it is honoring the CBA, article #11 by providing one meal for each shift worked. [UX 4].

The Hotel made no attempt to raise a procedural timeliness argument. Instead, the Hotel made substantive claims regarding the contract and the merits of the grievance and asked for additional evidence. By this posture, the Hotel has waived its right to raise timeliness objections to the Arbitrator.

2. The Hotel's Failure to Provide Breakfast to Its Employees Is a Continuing Violation That Tolls the CBA's Time Limit for Filing a Grievance

The Hotel's claims of untimeliness also fail substantively. The argument that the CBA required the grievance be filed within thirteen days ignores that each morning employees are denied breakfast is a new violation of the contract. The Hotel's failure to provide breakfast amounts to a continuing violation. A repeated, continued violation of the contract deserves particular attention and is less amenable to a contractual time limitation than standalone

transgressions. *See Consolidation Coal Co*., 112 LA 407, 408 (West, Arb. 1999) (finding that "as a practical matter, some deference should be given to an ongoing, as opposed to an isolated, incident" and refusing to impute knowledge to the Union or enforce a ten-day contractual time limit), *cited in* Elkouri at 5.7.A.ii., n.161; *AFSCME Local 3135*, 2001 LA Supp. 114898 (Reeves, Arb. 2001) (holding that, under a contract with a 10-day limitation from when the grievant "should have reasonably known" about a violation, "in the event of a continuing violation, the 10-day period starts anew every day"). A continuing violation gives rises to a continuing grievance, which can be filed "at any time, up to the end of such [continuing violation.]" *William Scheele & Sons Co*., 68 LA 574, 578 (Mikulina, Arb. 1977) (rejecting the company's untimeliness argument before denying the grievance on the merits).

The continuing violation doctrine is especially applicable to the instant case, considering the Union's efforts to work with the Hotel on reopening and the uncertainties of the pandemic itself. Further, the Union acknowledges that it may no longer seek a remedy for individual violations that occurred more than thirteen days prior to the grievance. But whether the Hotel violated the CBA in July or November 2021, both are identical violations with the same simple remedy: The Hotel must provide breakfast to its employees as it did each day before the strike and the pandemic.

3. The Hotel's Dishonest Tactics of Evasion and Delay Impeded the Filing of the Grievance

Finally, the Hotel's evasive conduct weighs against a finding that the grievance is untimely. "Forfeiture of a grievance based on missed time limits should be avoided whenever possible." *Safeway Stores*, 95 LA 668, 673 (Goodman, Arb. 1990) This is an offshoot of the "general presumption . . . that favors arbitration over dismissal of grievances on technical

grounds." Elkouri & Elkouri at 5.3.B (citing cases). Such a presumption should hold especially true when the grievant's alleged technical violation of the contractual time limit is owed to management foot-dragging. *Cf. Consolidation Coal Co.*, 112 LA 407, 407–08 (West, Arb. 1999) (refusing to speculate about the grievant's actual knowledge when his inquiries "received no answer").

Shop Steward ___ made good faith inquiries into the status of reopening the staff cafeteria for breakfast. These inquiries provided the Hotel an opportunity to correct the continuing violation, an opportunity that it ignored. Rather than providing a straight answer, General Manager ___ repeatedly prevaricated, promising to ask around but providing no clarity. In the fog of reopening in the pandemic, awareness of the violation coalesced over several conversations between the parties. The Union should not be prejudiced for its forbearance in waiting to file this grievance until it became clear that the Hotel had no intention of honoring its prior practice.

For all these reasons, the Arbitrator must find that the grievance was timely filed, reject the Hotel's objection, and decide this case on the merits.

b. <u>The Hotel Violated Article 10 of the CBA When It Ceased Providing Breakfast in the Staff Cafeteria</u>

This case is straightforward. The Union has shown that the Hotel had a prior practice of consistently providing certain breakfast items to its employees. The Hotel has adduced no evidence to contradict the testimony of Room Attendants ___ and ___ and Banquet Server ___. Article 10 of the CBA between the parties explicitly protects such prior practices from unilateral discontinuance. Recent arbitration decisions in Boston interpretating substantively identical contract language support a finding by the Arbitrator that the Hotel violated Article 10 when it failed to provide breakfast to its employees.

1. Article 10 Explicitly Protects Past Meal Practices Beyond the Provision of One Meal Per Shift Worked

The Hotel does not have the authority to unilaterally change its meal practice. Article 10 of the parties CBA guarantees two things: 1) one meal per shift worked and 2) "[a]ny other previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued." [UX 1, pp. 17–18.] This guarantee of continued past practices is a bargained-for element of the contract, distinct from the one-meal-per-shift requirement, that will be rendered meaningless if the Hotel can cease to provide the established breakfast options.

While the contract does not explicitly state that breakfast will be provided, it does explicitly protect established meal practices. Arbitrators have found complimentary meal and coffee practices binding because their provision goes beyond the basic functions that inhere to management and provides a special benefit to employees. *See Greater L.A. Zoo Ass'n*, 60 LA 838, 842 (Christopher, Arb. 1973) (determining the employer violated its CBA when it changed a past practice and began requiring employees to purchase their own meals); *Farmland Industries*, 72 LA 1302, 1307 (Heneman, Arb. 1979) (finding that the provision of a certain kind of pizza as a meal option constituted a binding past practice); *see also* Elkouri & Elkouri at 12.5.C. (noting that a past practice of "free coffee or free meals" is a benefit that cannot be unilaterally terminated by management). Contract clauses that protect particular *kinds* of past practice operate to limit the rights of management to make unilateral changes. *See City of Greenfield*, 77 LA 8, 10–11 (Yaffe, Arb. 1981) (rejecting management's attempts to change its meal practices "where the parties have negotiated a maintenance of standards clause protecting all favorable working conditions which have been established by past practice").

Here, the Union has demonstrated through the testimony of multiple employees, uncontradicted by any evidence in the record, that the core breakfast options offered in the past constituted a clear and binding past practice. The availability of light fare for workers to enjoy on their breaks throughout the morning confers a material benefit to employees, eliminating the need to procure their own breakfast. The combination of the clear and long-standing practice of providing breakfast and the bargained-for maintenance of meal standards clause limits the Hotel's prerogatives and prevents it from discontinuing the breakfast practice.

2. Recent Arbitration Decisions Support This Interpretation and Application of Article 10 to Circumstances Like This One

As a result of what appears to be Boston area hotels' collective effort to diminish or eliminate employee meals in Boston area hotels, this is the fourth employee cafeteria case to proceed to arbitration in the past year. Two of these cases have produced arbitration awards which arrived at different results, but the reasoning of both supports the Union's position in this matter.

. . . .

VI. CONCLUSION

For the above reasons, the Arbitrator must find that the Hotel has violated the CBA by abandoning its past practice of providing breakfast to its employees. The Union respectfully requests that the Arbitrator sustain its grievance and render the appropriate remedy, which in this case is to direct the Hotel to resume offering the same consistent, core breakfast offerings—bagels, assorted breads, cereal, milk, coffee, tea, sugar, creamer, peanut butter, jelly, and cream cheese—that were available all morning before the strike and the pandemic.

Further, for the duration of the continuing violation, the Union respectfully requests that the Hotel pay each employee $10 per day for every shift worked since November 5, 2021, which is thirteen days prior to the filing of the grievance. [*See* UX 1, p. 23; UX 3.] This reflects the approximate value of coffee and a bagel at any local Boston establishment, and is supported by the parties' mutual agreement, codified twice, of the $10 value of failure to comply with Article 10. [*See* CX 1 & CX 2.]

Applicant Details

First Name	**Matt**
Last Name	**Nussbaum**
Citizenship Status	**U. S. Citizen**
Email Address	**m.nussbaum@wustl.edu**
Address	**Address** **Street** **309 Johnson Ave** **City** **Oaklyn** **State/Territory** **New Jersey** **Zip** **08107** **Country** **United States**
Contact Phone Number	**856-669-9882**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2019**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 12, 2024**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Van Ostran, Cort
cort.vanostran@gmail.com
Hollander-Blumoff, Rebecca
rhollander@wustl.edu
314-935-6043
Crum, Travis
crum@wustl.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Matt Nussbaum
309 Johnson Avenue
Oaklyn, NJ 08107
(856) 669-9882
m.nussbaum@wustl.edu

June 26, 2023

The Honorable Stephanie Dawkins Davis
U.S. Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 W. Lafayette Blvd.
Detroit, MI 48226

Dear Judge Davis:

My name is Matt Nussbaum and I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am currently a rising third-year student at the Washington University School of Law, where I am an Executive Editor of the *Washington University Law Review* as well as a member of our National Moot Court team.

Enclosed please find my résumé, transcript, and writing samples. The following individuals are submitting letters of recommendation on my behalf and welcome inquiries in the meantime.

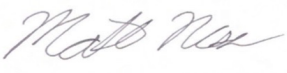
Professor Travis Crum
Washington University
School of Law
crum@wustl.edu
(314) 935-1612

Professor Rebecca
Hollander-Blumoff
Washington University
School of Law
rhollander@wustl.edu
(314) 935-6043

Professor Cort VanOstran
Washington University
School of Law
cort.vanostran@gmail.com
(314) 295-6040

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,



Matt Nussbaum

Matthew J. Nussbaum

309 Johnson Avenue, Oaklyn, NJ | m.nussbaum@wustl.edu | 856.669.9882

EDUCATION

Washington University School of Law May 2024
Juris Doctor Candidate Saint Louis, MO
GPA: 3.75 (Top 20% = 3.76)

Washington University Law Review – Vol. 101, Executive Editor; Vol. 100, Staff Editor
National Moot Court Team – 2023 Spong Invitational Runner-up; Best Respondent's Brief Award
Dean's List – Spring 2023; Fall 2022; Spring 2022
Research Assistant for Professor Kyle Rozema
American Constitution Society
Jewish Law Society – Board Member
Scholar in Law Award Recipient (merit-based)

American University, School of Public Affairs August 2020
Master of Public Administration, Public Financial Management Specialization Washington, DC

American University, School of Public Affairs May 2019
Bachelor of Arts in Economics and Bachelor of Arts in Political Science Washington, DC

Thesis: "Social Welfare Policy Analysis: How Collective Decisions are Made"
Alpha Epsilon Pi Fraternity – President
Teaching Assistant for Professor Mary Hansen – Principles of Microeconomics, Spring 2019

EXPERIENCE

Willkie Farr & Gallagher LLP May 2023 – Present
Summer Law Clerk New York, NY

- Researching complex legal issues, such as the scope of the FTC's rulemaking authority and whether the agency's proposed ban of non-compete agreements violates the major questions doctrine
- Reviewing briefs for clarity and ensuring that all relevant facts are included

United States Attorney's Office – District of New Jersey May 2022 – July 2022
Summer Legal Intern Newark, NJ

- Researched and prepared briefs on a variety of legal issues, including compelled decryption and health care fraud, for Assistant United States Attorneys
- Assisted in trial preparation by transcribing wiretapped conversations and compiling relevant quotes for use in a show-and-tell presentation
- Aided with plea negotiation preparations in a deprivation of civil rights case by reviewing field interviews and formulating a compelling story of the case

Andy Kim for Congress September 2020 – November 2020
Finance Assistant Marlton, NJ

- Managed a team of seven finance interns on a successful Congressional campaign
- Organized fundraising and phone banking efforts for a campaign that raised over $2 million in Q3 without taking funds from corporate PACs
- Collaborated with Finance Director to organize a fundraising event that raised $25,000

INTERESTS AND AFFILIATIONS

Sports fan (Mets, Steelers, and Penguins); Movies; Golf; Trivia; and Weightlifting.

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Washington University in St. Louis

Office of the University Registrar

Record Of: **Nussbaum, Matthew**
Student ID Number: 503820

Current Programs Of Study:
JURIS DOCTOR

Transcript Issued 06/07/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	A
CONTRACTS (BAKER)	LAW	W74 501H	4.0	A-
CIVIL PROCEDURE (HOLLANDER-BLUMOFF)	LAW	W74 506M	4.0	A-
TORTS (ROZEMA)	LAW	W74 515L	4.0	A-

Enrolled Units 14.0 Semester GPA 3.66 Cumulative Units 14.0 Cumulative GPA 3.66

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	A
CRIMINAL LAW (KATZ)	LAW	W74 502S	4.0	A-
NEGOTIATION (NICKERSON)	LAW	W74 503J	1.0	CR
PROPERTY (DROBAK)	LAW	W74 507D	4.0	A
CONSTITUTIONAL LAW (CRUM)	LAW	W74 520R	4.0	A

Enrolled Units 16.0 Semester GPA 3.80 Cumulative Units 30.0 Cumulative GPA 3.73

Fall Semester 2022

CORPORATIONS (FRANKENREITER)	LAW	W74 538W	3.0	A-
BUSINESS NEGOTIATION THEORY AND PRACTICE (REEVES)	LAW	W74 578L	3.0	A
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	A-
APPELLATE ADVOCACY (FINNERAN/VAN OSTRAN)	LAW	W74 660B	3.0	A
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.0 Semester GPA 3.72 Cumulative Units 44.0 Cumulative GPA 3.73

Spring Semester 2023

INTERNATIONAL BUSINESS	MGT	B63 512	3.0	A-
EVIDENCE (HARAWA)	LAW	W74 547N	3.0	A
ETHICS AND PROFESSIONALISM IN THE PRACTICE OF LAW (PRATZEL)	LAW	W74 562C	2.0	A
SECURITIES REGULATION (SELIGMAN)	LAW	W74 569C	3.0	A-
ANTITRUST (DROBAK)	LAW	W74 611C	3.0	A
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 16.0 Semester GPA 3.85 Cumulative Units 60.0 Cumulative GPA 3.75

Keri A. Disch, University Registrar

TO VERIFY: TRANSLUCENT GLOBE ICONS MUST BE VISIBLE WHEN HELD TOWARD A LIGHT SOURCE

Washington University in St. Louis

Office of the University Registrar

Record Of: **Nussbaum, Matthew**
Student ID Number: 503820

Spring Semester 2023

Remarks

SP2023 FROM: OLIN SCHOOL OF BUSINESS LAW SCHOOL ELECTIVE 3.0 UNITS

Distinctions, Prizes and Awards

SP2022 DEAN'S LIST
FL2022 DEAN'S LIST

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

Washington University in St. Louis is accredited by the Higher Learning Commission www.hlcommission.org, and its schools by various professional accrediting bodies. The CEEB code is 6929.

Transcript Nomenclature
Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

GRG GRAY RITTER GRAHAM

cvanostran@grgpc.com

April 13, 2023

Dear Judge:

I write to offer my support for Matt Nussbaum's application for a clerkship with your chambers. By way of background, I am a practicing litigator in St. Louis, Missouri. I spent two years as a Visiting Lecturer in Law at Washington University, where I remain an adjunct professor. I also coach Washington University's moot court team. I previously served as a law clerk to two U.S. District Judges in the Eastern District of Missouri, so I am intimately familiar with the unique skillset that is required of successful law clerks.

Matt is an impressive student. His thoughtfulness and confidence empower him to work collaboratively and advocate aggressively. He is smart, hardworking, and dedicated, and he will be an asset to your chambers.

I first came to know Matt during his time as a student in my Appellate Advocacy course in the fall of 2022. Matt was focused, engaged with the material, and one of the strongest oral advocates in the class. His ability to comprehend, criticize, and elaborate upon legal arguments in real time was impressive. Moreover, his remarkable work ethic assured strong performances behind the podium and in his written work. Outside of my class, Matt's impressive academic performance and credentials speak for themselves.

I next worked with Matt during the spring semester of this year as he prepared and competed with the moot court team at an inter-school competition in Virginia. Matt and his team were finalists in the competition, successfully completing numerous rounds of argument before imposing panels of state and federal judges. Matt's team also won the competition's best brief award—a testament to Matt's demonstrated abilities as a clear, concise legal writer.

I was most impressed not by the results of this competition, but by Matt's desire to go above and beyond what was required of him to guarantee success. He took his role on the team extremely seriously, often asking nuanced questions and putting in considerable time outside of scheduled practices. Again, his work ethic was on full display and played no small part in his team's success.

701 MARKET, SUITE 800 ST. LOUIS, MISSOURI 63101-1826
Telephone: 314-241-5620 Toll Free: 800-451-2950 Facsimile: 314-241-4140 www.grgpc.com

I recommend Matt Nussbaum enthusiastically and without reservation. Let me know how else I might best advance his candidacy, and please feel free to contact me if I can be of additional assistance.

Yours sincerely,

Cort VanOstran, Esq.
Gray Ritter Graham P.C.
314.295.6040

218 / 2057059 / 123015

Washington University in St. Louis
SCHOOL OF LAW

November 11, 2022

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Matt Nussbaum

Dear Judge Davis:

I am very pleased to recommend Matthew Nussbaum for a clerkship in your Chambers. Matt is just a delightful student – smart, thoughtful, conscientious, and engaged. I have complete confidence that he will excel as a clerk.

I had the pleasure of getting to know Matt last fall when he was a student in my first-year Civil Procedure section. I teach the class using the Socratic method, and also rely on volunteers. Matt was always well prepared and ready with a correct answer, and reliably asked important and incisive questions. Matt received an A- grade, just shy of a flat A, on our anonymously graded exam, demonstrating mastery of the material and a strong capacity to write well, analyze new facts, and apply doctrine correctly. Matt is also currently my student in Federal Courts, one of the most difficult in the law school curriculum, where we cover complex topics including justiciability doctrine, federal court jurisdiction and the scope of Congress's control thereof, non-Article III courts, sovereign immunity, and more. Matt has regularly distinguished himself in class discussion about these thorny issues, despite the class size of almost 90 students. He is the kind of stalwart student, always engaged, always well-prepared, who is exceptionally helpful to class discussion because he regularly provides a thoughtful and insightful perspective on the reading and course topics rather than just a simple regurgitation of case facts.

Given his very consistent academic performance, it is no surprise that Matt has the requisite legal acumen to be a fine clerk. However, Matt is delightful in person as well. He is straightforward and no-nonsense, while also respectful, warm, and personable. I am always delighted to see him in office hours, where he asks both clarifying questions about complexities in the doctrine and more theoretical questions that demonstrate his natural curiosity and his sophisticated approach to the course material.

In sum, Matt has every characteristic one might want in a law clerk. He is smart and committed to his studies, and he will certainly be an excellent colleague. I am very glad to offer my strong recommendation to you.

Best,

/s/

Rebecca Hollander-Blumoff
Vice Dean for Research and Faculty Development
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

May 24, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Matt Nussbaum

Dear Judge Davis:

I am writing to recommend my student, Matthew Nussbaum, who has applied for a clerkship in your chambers. As someone who clerked at all three levels of the federal judiciary, I am confident that Matt will be a great law clerk. He has my strong recommendation for your chambers.

I first got to know Matt when he took my Constitutional Law class in Spring 2022, where he earned an A based on his anonymously graded exam and class participation. Matt's exam was near the top of the pile. His two essay answers were especially strong. Matt wrote a thorough and balanced "memo-style" answer to a difficult and open question of constitutional law, namely whether *Katzenbach, Boerne*, or *Shelby County* supplies the governing standard for Congress's authority to pass a nationwide statute enforcing the Fifteenth Amendment. In addition, he wrote a very strong "big picture" response to a question about the proper role of historical gloss in constitutional interpretation.

Matt was very engaged in the class. He never hesitated to ask for clarifications when something was unclear, which, as a relatively new professor, was invaluable. And here's why: if Matt wasn't following what was going on, I suspected that the majority of his peers were even more lost. It was apparent that Matt was quite eager to learn more about constitutional law.

Beyond succeeding in my class, Matt has done well here at WashULaw. Matt is in the top quarter of the class, and he is on our National Moot Court team, where he won the Best Respondent's Brief Award. Matt also has a penchant for leadership roles. He is Executive Editor of the *Washington University Law Review* and a board member of the Jewish Law Society. In observing my students inside and outside of class, it is clear to me that Matt is a natural leader.

In addition, Matt has strong connections to New Jersey, where he grew up. Prior to law school, he worked on a New Jersey congressional campaign. For his 1L summer, he interned at the New Jersey U.S. Attorney's Office. His long-term goal is to return home and become an AUSA in that office. Indeed, I've spoken with Matt in depth about his desire to have a career in public service, and I predict that he will be a diligent and fair-minded public servant.

In my interactions with Matt, he has come across as intellectually curious, extraverted, and kindhearted. I have no doubt that he will help make chambers a friendly and pleasant place to work.

Please feel free to call or e-mail me if I can offer any further information. I can be reached at my office at 314-935-1612 or on my cell at 240-446-6705.

Best,

/s/

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WRITING SAMPLE

The attached writing sample is an appellate brief I completed for my Appellate Advocacy course during my third semester of law school in the fall of 2022. I represented the appellant, Mr. Mark Worthy, in his appeal of a district court's denial of his motion for habeas corpus relief relating to a claim of ineffective assistance of counsel Mr. Worthy alleged to have received at the trial court. This appeal was made before the Eighth Circuit of Appeals. All parties and facts in this case are fictional.

I received the highest grade in my class for the argument section of this brief, which begins on page 5 of this document. This brief examines the jurisprudence surrounding *Strickland* claims of ineffective assistance of counsel, and the requirements of deficiency and prejudice. This assignment required me to find and analyze relevant case law and thus I performed the entirety of the legal research on my own. The brief is wholly my work and has incorporated minor stylistic feedback from my professor. For the sake of brevity, I have excluded the cover page, tables of contents and authorities, the questions presented for review, signature block, and the certificates of compliance and service. A complete version of this brief is available upon request.

STATEMENT OF THE CASE

Mark Worthy was originally charged with honest services mail fraud in violation of 18 U.S.C. §§ 1341, 1346 on September 10, 2020. Mr. Worthy's indictment alleged that he, while serving as a city official, failed to "disclose to . . . any other agent of the City" that he possessed a minority ownership interest in a cleaning company to which he contracted certain public works projects. JA – 4. While Mr. Worthy did not receive any direct payments in return for the contracts, the government contended that his undisclosed self-dealing was in violation of federal law. Upon the advice of his counsel, Mr. Worthy pled guilty to the charge on November 13, 2020. On February 17, 2021, the United States District Court for the Eastern District of Missouri sentenced Mr. Worthy to 51 months of imprisonment, while still noting that Mr. Worthy's actions "may actually have saved [the city] money because of th[e] crime." JA – 20.

While incarcerated, Mr. Worthy learned of the Supreme Court's ruling in *Skilling v. United States*, 561 U.S. 358 (2010), which narrowed the definition of honest services fraud to exclude undisclosed self-dealing. Mr. Worthy promptly filed a motion for relief, alleging both that his conviction was unlawful because *Skilling* decriminalized his conduct and that he received ineffective assistance of counsel due to the fact that his trial attorney failed to mention the possibility of raising the *Skilling* argument. The government, in its response, argued that *Skilling* did not decriminalize Mr. Worthy's conduct. JA – 37–38. The district court converted Mr. Worthy's motion to a petition for habeas relief under 28 U.S.C. § 2255 and granted an evidentiary hearing on the second question of whether Mr. Worthy received ineffective assistance of counsel. JA – 40–43. Notably, the district court denied to address the claim that *Skilling* decriminalized his conduct by finding the argument was procedurally defaulted. JA – 42. The court raised this issue *sua sponte*, as the government did not raise this defense in its response. The record is silent on any

facts showing that the parties were made aware of the procedural default defense before the lower court ruled on it.

At the evidentiary hearing, Mr. Worthy's trial attorney admitted that he had not read *Skilling* at the time he was representing Mr. Worthy, even though he understood the case to be dealing with similar circumstances as those present in Mr. Worthy's case. JA – 50–51. Likewise, the attorney confessed he never mentioned the case or the potential defense to Mr. Worthy. JA – 56. During the hearing, Mr. Worthy fervently asserted that had he been aware the conduct for which he was being charged had been decriminalized, he would not have pled guilty to the charge. JA – 58, 61–62.

On May 3, 2022, the lower court denied Mr. Worthy's habeas motion. The lower court ruled that Mr. Worthy failed to meet his burden of "demonstrating that the outcome of the proceeding would have been different" had he been informed of *Skilling*. JA – 71. The court also found that Mr. Worthy's counsel was not unreasonable in failing to research and inform Mr. Worthy of potential defenses because doing so may have undermined counsel's chosen strategy to accept responsibilty and plead guilty. JA – 68–69. Not only did the district court deny Mr. Worthy's motion, but it also denied Mr. Worthy a certificate of appealability. JA – 71. On September 14, 2022 this Court granted Mr. Worthy a certificate of appealability on the issues of his ineffective assistance of counsel claim and the decision to deem the *Skilling* claim procedurally defaulted. JA – 77.

SUMMARY OF THE ARGUMENT

The district court erred in finding that Mr. Worthy did not receive ineffective assistance of counsel at his initial trial. This Court has repeatedly applied the *Strickland* test, which Mr. Worthy satisfied by showing he was never informed of relevant case law and counsel's failure to inform

prejudiced Mr. Worthy's decision to plead guilty. The test is satisfied when counsel does not act within an objective standard of reasonableness. This was the case with Mr. Worthy's representation. Counsel did not research basic case law surrounding Mr. Worthy's case, evidenced by the fact that he never informed his client, or himself, of the Supreme Court holding in *Skilling v. United States*, which limited the circumstances under which one can be convicted of honest services fraud under 18 U.S.C. § 1346. Any reasonable counsel would have made himself aware of the case when dealing with a client charged under the same statute in similar factual circumstances.

The district court also improperly applied the *Strickland* test by requiring Mr. Worthy to prove definitively that he would not have pled guilty to the crime had he been properly informed by his counsel. Instead, this Court has held that the proper standard is whether there is a *reasonable probability* that the defendant would not have pled guilty had they not received ineffective assistance of counsel. Applying precedent and the *Strickland* test, which this Court has consistently applied since the *Strickland* decision, this Court should hold that a petitioner is not required to definitively show prejudice, and the lower court erred in doing so. Therefore, the district court's ruling should be reversed.

The district court also erred in declaring Mr. Worthy's claim that *Skilling* decriminalized his conduct to be procedurally defaulted. As this Court has repeatedly recognized, parties must be given fair notice and an opportunity to be heard when a court chooses to raise an issue *sua sponte*. The government, in failing to raise the issue in its response, implicitly waived the defense of procedural default. By addressing the procedural default defense in its order, the lower court raised the issue on its own volition. However, the district court did not follow the proper procedure this Court has outlined for raising issues *sua sponte*. Further, the procedural default defense was

overcome by Mr. Worthy's showing of cause and prejudice. Thus, Mr. Worthy's *Skilling* claim should have been heard and ruled upon by the lower court, regardless of whether this Court agrees with the merits of Mr. Worthy's *Skilling* claim. As such, the district court's order should be reversed and remanded for further proceedings to allow the parties to address the procedural default defense and evaluate Mr. Worthy's *Skilling* claim.

ARGUMENT

This Court should reverse the lower court's decision because Mr. Worthy properly showed that he received ineffective assistance of counsel in violation of his Sixth Amendment rights. To show ineffective assistance of counsel, one must prove that their counsel was deficient beyond an objective standard of reasonableness, and that the errors were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984). Mr. Worthy has satisfied this test. The record shows that Mr. Worthy was never informed of key case law during his trial by his counsel, and had he been informed of that vital information he would not have pled guilty to the charge. JA – 50–56. Moreover, the district court erred in dismissing Mr. Worthy's *Skilling* claim as procedurally defaulted. The district court improperly entertained the affirmative defense of procedural default as the government failed to raise the defense in its response brief. When raising issues *sua sponte*, the court must provide both parties with fair notice and an opportunity to be heard. Since the lower court did not provide such notice and opportunity, its ruling on the issue was improper. Mr. Worthy therefore requests that the Court grant his habeas petition, but if the Court won't reverse we urge the Court to reverse and remand the lower court's judgment to have a proper ruling on Mr. Worthy's *Skilling* claim.

I. THE DISTRICT COURT ERRED IN FINDING THAT WORTHY DID NOT SATISFY THE STRICKLAND TEST

In the Eighth Circuit, ineffective assistance of counsel claims are mixed questions of law and fact, which are reviewed *de novo*. *See United States v. Frausto*, 754 F.3d 640, 642 (8th Cir. 2014).

Ineffective assistance of counsel claims can be raised for the first time in a motion under 28 U.S.C. § 2255, which is the situation in the present case. *See Massaro v. United States*, 538 U.S. 500 (2003). To determine whether a criminal defendant has received ineffective assistance of counsel in violation of the Sixth Amendment, the defendant must show that their counsel did not act within an "objective standard of reasonableness", and that the alleged deficiencies were "prejudicial to the defense." *Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984).

In this case, Mr. Worthy's trial attorney's performance was not reasonable under prevailing professional norms, and as such failed to satisfy the highly deferential reasonable conduct standard. *See Mayfield v. United States*, 955 F.3d 707, 710–11 (8th Cir. 2020) (articulating the strong presumption that counsel's actions were reasonably professional). By not informing himself, and consequently Mr. Worthy, of particularly relevant case law which may have provided Mr. Worthy with a defense, he did not act with reasonably professional conduct. Moreover, the record shows that were it not for his counsel's deficient representation, Mr. Worthy would not have pled guilty to Count I, making the counsel's error 'prejudicial'. JA – 58; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (defining the 'prejudice' prong in cases involving a guilty plea as a showing of reasonable probability that "but for counsel's errors" the defendant would not have pleaded guilty). With both *Strickland* prongs satisfied, the district court erred in denying Mr. Worthy's habeas motion and this Court should reverse the decision and grant Mr. Worthy habeas relief.

A. Worthy's Trial Counsel Was Deficient in Not Making Himself Aware of Particularly Relevant Case Law

To satisfy the first prong of the *Strickland* test – deficient performance – there must be a showing that counsel's performance was not reasonable as compared to the norms of the legal community. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). While there is a wide range of competence within which proficient representation can fall, *Tollett v. Henderson*, 411 U.S. 258, 266 (1973), this Court has found numerous circumstances in which counsel's performance was deficient, *see Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981); *see also Garmon v. Lockhart*, 938 F.2d 120 (8th Cir. 1991). In *Strickland*, the Supreme Court declined to specify a specific test to determine reasonableness, and it offered no specific examples as to what definitively may or may not qualify as deficient performance. *Strickland*, 466 U.S. at 688–91. However, subsequent decisions by both the Supreme Court and this Court have shown a consistent pattern g that a failure to conduct basic legal research constitutes deficient representation. *See Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law . . . combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *see also Mayfield v. United States*, 955 F.3d 707, 711 (8th Cir. 2020) ("Effective assistance requires the provision of reasonably informed advice on material issues.").

Mr. Wilburn admitted in his testimony that he had not read *Skilling v. United States*, 561 U.S. 358 (2010), at the time he was representing Mr. Worthy and advising him to accept the government's plea deal.[1] JA – 50. *Skilling* was decided years before Mr. Worthy was indicted, and so it was reasonable to expect Mr. Wilburn to be familiar with the ruling or at the very least have

[1] While Mr. Wilburn stated that he had since read the opinion in *Skilling* and did not believe it would have affected his advice, the *Strickland* deficient analysis is to be conducted by judging the counsel's actions at the time the advice was provided, not with the benefit of hindsight. *Strickland*, 466 U.S. at 689.

become familiar with the holding during his basic research for Mr. Worthy's case. Moreover, Mr. Wilburn admitted that he never even mentioned the case to his client and admits that he should have. JA – 56. *Skilling* construed 18 U.S.C. § 1346, the same charge levied against Mr. Worthy in Count I of the indictment, JA – 5, as only covering kickback and bribery schemes, *Skilling v. United States*, 561 U.S. 358 (2010). Notably, this does not cover cases involving a public official failing to disclose self-dealing. *Id.* at 410–14. That is precisely the action Mr. Worthy was improperly charged with. JA – 4.

Without addressing the merits of Mr. Worthy's *Skilling* claim, there is no question that the case was one of particular relevance and importance to Mr. Worthy's defense and any reasonable attorney would have performed the simple task of reading the case. Failing to perform the basic legal research required to understand *Skilling*, a seminal case defining the precise statute his client was being charged with violating, was deficient lawyering on the part of Mr. Wilburn under the framework that this Court has provided. The question is not whether Mr. Wilburn was reasonable in recommending Mr. Worthy accept the government's plea deal, but rather whether Mr. Wilburn was reasonable in not researching *Skilling* and deciding its relevance to the case. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (noting that the relevant question in a deficiency determination refers to the process rather than the conclusion). Mr. Wilburn's failure to consider a *Skilling* defense was not good process, regardless of the final determination.

B. Had Worthy Been Properly Informed of Skilling by His Counsel, There Is a Reasonable Probability He Would Not Have Pleaded Guilty to the Charge

The second prong of the *Strickland* ineffective assistance of counsel test – prejudice – is modified when used in the context of guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). To succeed in an ineffective assistance of counsel claim, one must satisfy the prejudice requirement by showing that there is a "reasonable probability" they "would not have pleaded guilty" if not for

the errors of their counsel. *Id.* at 59. Reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). Similar to the deficiency analysis, this examination is to be conducted without "the tint of hindsight." *Cox v. Lockhart*, 970 F.2d 448, 455 (8th Cir. 1992).

Mr. Worthy contended multiple times during his testimony that he would not have accepted the government's plea deal had he been made aware of *Skilling* potentially deeming his conduct legal. JA – 58, 62. When asked directly what his action would have been had he been properly informed of *Skilling*, Mr. Worthy said "I wouldn't go to trial" even if it was against the recommendation of his lawyer. JA – 58. There is a reasonable probability that Mr. Worthy would not have pleaded guilty were it not for his counsel's ineffectiveness, as that is precisely what he told the government during the evidentiary hearing. As such, the prejudice prong was satisfied and this Court must reverse the district court's holding and grant Mr. Worthy's habeas petition.

C. The District Court Unreasonably Applied an Improper Reading of the Strickland *Prejudice Prong by Requiring Worthy to Demonstrate Definitively That the Outcome Would Have Been Different*

As stated above, the second prong of the *Strickland* test in a habeas case involving a guilty plea is whether there is a "reasonable probability" that the defendant "would not have pleaded guilty" if their counsel had not erred. *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). When the trial court's application of *Strickland* is "unreasonable" it must be reversed. *See Williams v. Taylor*, 529 U.S. 362, 409 (2000); *Wanatee v. Ault*, 259 F.3d 700, 703–04 (8th Cir. 2001).[2]

[2] While both *Williams* and *Wanatee* involve the review of state court findings in § 2254 proceedings, it is well settled that "precedents under § 2255 and under § 2254 may generally be used interchangeably." 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 623 (4th ed. 2022); *see also Davis v. United States*, 417 U.S. 333, 343–44 (1974).

The district court clearly erred in its application of the *Strickland* prejudice prong, applying the wrong standard. The court held that Worthy had "not met his burden of demonstrating that the outcome of the proceeding would have been different." JA – 71. However, the relevant rule under *Hill v. Lockhart* is whether the defendant has shown a "reasonable probability" that the outcome would have been different, not that the outcome would have definitively been different as the district court stated. *Hill*, 474 U.S. at 59. While the *Strickland* standard is not easy to meet, the court's wholly incorrect application of the rule cannot be deemed reasonable and as such the prejudice analysis must be reanalyzed and determined under the proper rule. *See Williams v. Roper*, 695 F.3d 825, 831–33 (8th Cir. 2012).

II. THE DISTRICT COURT IMPROPERLY DISMISSED WORTHY'S CLAIM THAT *SKILLING* DECRIMINALIZED HIS CONDUCT AS PROCEDURALLY DEFAULTED

In this Court, district court findings of procedural default are reviewed *de novo*. *Harris v. Wallace*, 984 F.3d 641, 647 (8th Cir. 2021).

While generally in a § 2255 action any claim that was not raised properly at trial or on direct appeal is considered procedurally defaulted, there are some circumstances where a petitioner can have a claim that was not preserved heard in a habeas petition. *See Coleman v. Thompson*, 501 U.S. 722 (1991) (holding that procedural default applies in habeas proceedings); *see Massaro v. United States*, 538 U.S. 500, 505–06 (2003) (articulating an exception to the general rule of procedural default for ineffective assistance of counsel). One such example is when the government waives the affirmative defense of procedural default, either explicitly or implicitly. *See Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). Another example is when a petitioner can show cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722 (1991).

In this case, the lower court erroneously declared that Mr. Worthy's claim that *Skilling* decriminalized his alleged illegal conduct was "procedurally defaulted and [could not] be addressed directly by [the] Court on § 2255 review." JA – 42. We ask this Court to reverse and remand the proceedings to the district court, with instructions to evaluate Mr. Worthy's claim that *Skilling* decriminalized his conduct.

A. The District Court Failed to Provide the Parties with Fair Notice and an Opportunity to Be Heard As Is Required When It Chooses to Address Procedural Default Sua Sponte

When the government fails "to advance a procedural default argument", it has implicitly waived the argument. *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). While a procedural default argument waived by the government can be heard *sua sponte*, *Jones v. Norman*, 633 F.3d 661, 666 (8th Cir. 2011), the court must give both parties "fair notice and an opportunity to present their positions" when it chooses to do so, *Dansby v. Hobbs*, 766 F.3d 809, 824 (8th Cir. 2014). When a court fails to afford parties "adequate notice and opportunity to be heard," the claim "must be remanded for further consideration." *Dansby*, 766 F.3d at 825; *see also Am. Red Cross v. Cmty. Blood Ctr. of the Ozarks*, 257 F.3d 859 (8th Cir. 2001).

Here, the lower court improperly raised and decided on the procedural default argument. The government failed to mention procedural default in its response to Mr. Worthy's motion for relief. JA – 37–38. Given this failure to advance the argument, the defense was waived and the district court's only pathway to addressing procedural default was to raise it *sua sponte*. That is precisely what the court did when it found that the *Skilling* claim, among others, was "procedurally defaulted and [could not] be addressed directly by this court." JA – 42. However, the district court failed to provide the parties with any notice or opportunity to be heard. The record is silent on any facts that may show that Mr. Worthy was aware that the court would consider such an issue. When

a party has no opportunity to respond, it is clear the court has overstepped its powers to consider arguments *sua sponte*. *See Barkley, Inc. v. Gabriel Bros., Inc.*, 829 F.3d 1030, 1041 (8th Cir. 2016). Because Mr. Worthy was never provided the option to respond to the argument that his *Skilling* claim was procedurally defaulted, the district court's finding cannot stand.

B. Worthy Satisfied the Cause and Prejudice Requirements to Overcome Procedural Default Even If the Court Validly Raised the Argument Sua Sponte

The district court must properly evaluate Mr. Worthy's *Skilling* claim because even if this Court finds that the lower court was proper in raising the argument *sua sponte*, Mr. Worthy showed cause and prejudice for failing to raise the claim.

The Supreme Court has noted that procedurally defaulted issues can still be heard if there was a proper cause and prejudice for not raising the issue. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Wainwright v. Sykes*, 433 U.S. 72 (1977) (holding that a showing of "cause" and "prejudice" can overcome procedural default in a habeas proceeding). Cause has been defined as "some objective factor external to the defense" that made it difficult or impossible to raise the issue properly. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A showing of ineffective assistance of counsel has been deemed satisfactory for the cause requirement. *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000). To show actual prejudice, there must be a "reasonable probability that the result of the trial would have been different." *Strickler v. Greene*, 527 U.S. 263, 289 (1999).

1. Worthy Received Ineffective Assistance of Counsel Satisfying the Cause Requirement

Mr. Worthy has demonstrated cause for the procedural default on the basis that he received ineffective assistance of counsel. The argument showing ineffective assistance of counsel has been laid out earlier in this brief. See section I. Given the explicit holdings that a showing of ineffective assistance of counsel satisfies the cause requirement, Mr. Worthy has shown that such cause exists.

2. Had Worthy's *Skilling* Claim Been Raised Initially There Is a Reasonable Probability That the Result Would Have Been Different Satisfying the Actual Prejudice Requirement

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court narrowly interpreted 18 U.S.C. § 1346 as to not criminalize honest-services fraud in the absence of a kickback or a bribe. A kickback scheme is often defined by the court in the context of *McNally v. United States*, 483 U.S. 350 (1987), in which a public official arranged for a company to obtain public funds in exchange for that company sharing its commissions with "entities in which the official held an interest." *McNally*, 483 U.S. at 353. The Court in *Skilling* noted that a "mere failure to disclose a conflict of interest" does not make a scheme a kickback, but rather whether "the official conspired with a third party so that both would profit from wealth generated by public contracts." *Skilling*, 561 U.S. at 410. Subsequent proceedings have affirmed the definition of schemes as 'kickbacks' in situations when the government never received the contracted services, *Covington v. United States*, 739 F.3d 1087 (8th Cir. 2014) or when the payments made were excessive, *United States v. Redzic*, 627 F.3d 683 (8th Cir. 2010), among others.

In the present case, Mr. Worthy's failure to disclose his financial interest in Cleaner Pastures, while unwise and perhaps immoral, cannot be found to be illegal. There is no precedent for finding that a situation in which the government received the exact services it contracted for, JA – 20, the contracting party charged market, if not sub-market rates, JA – 20, and the public

official received no outside benefit in exchange for the act of providing contracts, JA – 63–65, could be classified as a kickback scheme. The only thing the record notes Mr. Worthy as being guilty of is betraying the public trust with his undisclosed self-dealing. JA – 24. But the Supreme Court "specifically rejected a proposal to construe the statute as encompassing" undisclosed self-dealing. *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). The record is devoid of evidence showing Mr. Worthy guilty of anything that has previously been considered a crime under 18 U.S.C. § 1346 since the *Skilling* decision. As such, there is a reasonable probability that if Mr. Worthy were to have been able to raise this claim the result of the trial would have been different. Thus, actual prejudice is satisfied, and this Court should hold that the lower court erred in finding this issue to be procedurally defaulted.

CONCLUSION

Because the failure of counsel to inform himself and his client of particularly relevant caselaw satisfies the *Strickland* test for ineffective assistance of counsel, this Court should reverse the decision of the district court and hold that Mr. Worthy's Sixth Amendment rights were violated and thus, he is entitled to habeas relief. Further, even if this Court does not agree that Mr. Worthy received ineffective assistance of counsel, this Court should reverse the district court's decision and remand for further proceedings because the lower court improperly dismissed his *Skilling* claim as procedurally defaulted in violation of this Court's binding precedent.

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WRITING SAMPLE

The attached writing sample is an appellate brief I completed while competing on Washington University's National Moot Court Team. This brief was written for the William B. Spong, Jr., Invitational Moot Court Tournament during the spring of 2023. This brief was written from the perspective of the federal government, the appellee in the hypothetical case surrounding a warrantless search of a vehicle's onboard computer. The central issue was whether the search of a vehicle's onboard computer fell within the automobile exception of the Fourth Amendment's warrant requirement. All parties and facts in this case are fictional.

My team won the Best Respondent's Brief Award at the competition for having the highest scoring brief in the field from the respondent side. The team was comprised of myself and two others, however the brief writing was split into separate portions between us. The section I have included is the first half of the argument section, which was my assigned portion of the brief. This assignment required me to find and analyze relevant case law, however I did discuss some of the legal research with my teammates during the writing process. This portion of the brief is wholly my work and has incorporated minor editing feedback from my teammate. A complete version of this brief is available upon request.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY FOUND THAT LAW ENFORCEMENT CONDUCTED A VALID SEARCH OF APPELLANT'S VEHICLE'S ONBOARD COMPUTER SYSTEM

This court reviews the validity of a warrantless search *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 691 (1996). The Fourth Amendment requires all searches and seizures by law enforcement to be reasonable. *See* U.S. CONST. amend. IV. Because law enforcement officers searched Petitioner's vehicle pursuant to the automobile exception to the warrant requirement, Petitioner's motion to suppress must be denied. *See Carroll v. United States*, 267 U.S. 132, 153–54 (1925). The automobile exception to the warrant requirement permits law enforcement officers to conduct a search of a vehicle and its contents if there is probable cause to do so. *See United States v. Ross*, 456 U.S. 798, 825 (1982). Probable cause exists when "there is a fair probability that . . . evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The officers did not violate Petitioner's Fourth Amendment rights when they pulled and reviewed the data from his Cadillac's on-board computer because this search was supported by probable cause to find evidence of Petitioner's reckless driving. *See California v. Acevedo*, 500 U.S. 565, 579 (1991); *Ross*, 456 U.S. at 821–22 (1982).

Even if the officers did not believe Petitioner was criminally liable for the crash, a warrantless search of a vehicle involved in a crash on public roads is reasonable. *See Cady v. Dombrowski*, 413 U.S. 433, 466–67 (1973) (validating the search of a vehicle disabled in an accident on a public highway even though the search occurred in a private tow lot). Searching the on-board computer, and not just the vehicle itself, still falls under the automobile exception because the exception extends to containers found within a vehicle that could contain the object of the search. *See Acevedo*, 500 U.S. at 579–80; *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). Because the officers lawfully obtained the video evidence recorded by the SVR, the plain view

doctrine applies, permitting the seizure of the video showing Petitioner in possession of illegal narcotics. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Moreover, this Court's decision in *Riley v. United States* is not applicable here because *Riley*'s holding is limited to searches incident to arrest, a distinct exception to the Fourth Amendment's warrant requirement. *See* 573 U.S. 373, 401–02 (2014) ("[E]ven though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone."). Even if *Riley* were applicable in the context of other searches, it cannot govern here because an on-board computer is distinct from a cell phone, the target of *Riley*'s protections. *See id.* at 397. Given these differences, the Thirteenth Circuit properly upheld the search's validity, so Petitioner's motion to suppress should be denied.

A. The Search of Petitioner's Vehicle, Including the Onboard Computer, Was Constitutionally Valid Under the Automobile Exception

It is well established in this Court that, so long as officers have probable cause to search a vehicle, they may do so without a warrant under the automobile exception. *See Acevedo*, 500 U.S. at 569. In this case, officers had sufficient probable cause to search Petitioner's vehicle for evidence regarding the car accident without a warrant pursuant to the automobile exception. The scope of the officers' search may extend to any container within the vehicle they reasonably believe may contain the object of the search. *See Houghton*, 326 U.S. at 302. The officers reasonably obtained the contents of the on-board computer because evidence regarding Petitioner's liability for the accident could have been stored within it. *See Acevedo*, 500 U.S. at 572–73 (affirming the warrantless search of a container under the automobile exception because there was probable cause to believe that the object of the search might be found in the container). Given the presence of probable cause, law enforcement was constitutionally permitted to perform a warrantless search of the vehicle and containers within it.

1. The Onboard Computer in Petitioner's Vehicle Is a Container for the Purposes of the Automobile Exception, So Its Search was Constitutionally Valid

When searching pursuant to the automobile exception, an officer may search any container within the vehicle that may contain evidence of a crime. *See Acevedo*, 500 U.S. at 579. A container is "any object capable of holding another object." *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981). Applying *Belton* to the modern technological age, several lower courts have included electronic devices like onboard computers within their definitions of a container. *See United States v. Keck*, 2 F.4th 1085, 1089 (8th Cir. 2021) (noting that the automobile exception extends to containers within a vehicle, and that "includes electronic evidence"); *United States v. Gaskin*, 364 F.3d 438, 458 (2d Cir. 2004) (finding that the automobile exception can justify seizure of electronics); *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("[I]t seems natural that computers should fall into the same category as suitcases."); *United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) (assuming that, for the purposes of the decision, computer disks are containers); *United States v. Davis*, 787 F. Supp. 2d 1165, 1171 (D. Or. 2011) (finding that the search of cell phones found in a vehicle pursuant to the automobile exception comports with the Fourth Amendment).

The Cadillac's on-board computer is a container that locally stores the vehicle's data. The vehicle itself created a finite set of data which is locally stored in the computer, including data from the SVR. Thus, the computer is like a glove box; it is built directly into the car, and its search requires accessing only the limited contents found within it. Non-movable containers of this type fall squarely within those containers searchable under the automobile exception. *See, e.g.*, *Ross*, 456 U.S. at 823. The automobile exception "justifies the search of *every part of the vehicle and its contents* that may conceal the object of the search." *Houghton*, 526 U.S. at 301 (emphasis added). The computer is quite literally a part of Petitioner's vehicle and contains data

that can, and did, directly reveal evidence of Petitioner's reckless driving. Whether the evidence collected is physical or digital should not alter this Court's analysis.

Due to the severity of the accident, the officers had probable cause to believe Petitioner was driving recklessly. R. at 6. The officers pulled the vehicle data from Petitioner's on-board computer because they reasonably believed it would contain evidence pertaining to the nature of Petitioner's driving at the time of the accident. Rather than upending existing automobile-exception precedent by crafting a novel interpretation of the term 'container,' the Thirteenth Circuit wisely adopted the approaches of its sister circuits by determining that the search of the on-board computer fell under the purview of the automobile exception. R. at 18. Because narrowly extending the automobile exception to a non-movable electronic device with limited storage capabilities comports with the original justifications for the automobile exception and existing precedent, the search of the SVR was reasonable under the Fourth Amendment.

2. The Officer's Probable Cause to Search the Onboard Computer Justified the Seizure of the Fentanyl Under the Plain View Doctrine

The search of the video data stored by the onboard computer, even two days later, was reasonable because searches under the automobile exception do not need to be immediate. *See United States v. Johns*, 469 U.S. 478, 487–88 (holding that a three-day delay in the warrantless search of containers taken from a vehicle pursuant to the automobile exception did not render the search unconstitutional). If there is probable cause to justify a warrantless search of a vehicle on a public road, "[officers] may conduct either an immediate or a delayed search of the vehicle." *Acevedo*, 500 U.S. at 570.

Upon performing standard interviews and a cursory search of the accident, the officers reasonably concluded, based on the severity of the crash, that Petitioner's driving may have been criminally reckless, and his vehicle could contain information confirming or denying that. R. at 4–

6. Officers properly utilized the Berla device to pull information locally stored on the on-board computer which they believed could have contained evidence regarding the crash and Petitioner's liability. *See* BERLA, https://berla.co/ (last visited Jan. 7, 2023) (describing critical information Berla devices can pull to help investigators uncover what occurred in accidents). Petitioner cannot plausibly argue that evidence of his reckless driving was not contained in the computer's data. This Court has noted that the "scope of a warrantless search of an automobile . . . is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ross*, 456 U.S. at 798. The probable cause to access the computer's data still existed two days later when investigators reviewed the video data pulled. Thus, there is no evidence that a delayed search of the SVR video unreasonably burdened Petitioner's Fourth Amendment interests. *See Johns*, 469 U.S. at 487–88. Moreover, the fact that the evidence may not have been at risk of being lost is not relevant because no finding of exigency is required to satisfy the automobile exception. *See Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (overruling a state decision requiring exigency for the automobile exception to be applied as squarely contrary to this Court's precedent). Because the investigator's review of the SVR data was valid under the automobile exception, the fruit of the search is admissible evidence.

Even though the investigators were not searching for evidence of drug activity, the SVR video showing Petitioner handling fentanyl is admissible because of the plain view doctrine. The plain view doctrine permits the seizure of evidence which was not the intended target of a search so long as it was found during a lawful search and its criminality was immediately apparent. *See Horton v. California*, 496 U.S. 128, 140–42 (1990).

First, we have already established that the officers lawfully viewed the data from the vehicle's computer pursuant to the automobile exception. Second, the incriminating nature of the

fentanyl was immediately apparent to the officers. R. at 7. Thus, the plain view doctrine allows the officers to seize the evidence showing Petitioner in possession of illegal narcotics. It was therefore lawful for the officers to use this evidence to obtain a search warrant for the search of Petitioner's garage and the seizure of 2,000 pills of illegally manufactured rainbow fentanyl. R. at 7.

Officers had probable cause to believe Petitioner's vehicle contained evidence of a crime which they were investigating. As such, they performed a constitutionally valid warrantless search of the vehicle pursuant to the automobile exception. As a part of that valid search, officers investigated the contents of the vehicle's on-board computer system, which has properly been characterized as a container. Precedent clearly establishes that containers in a vehicle may be searched pursuant to the automobile exception. Thus, the contents downloaded from the on-board computer were obtained legally. When law enforcement came across evidence that Petitioner possessed fentanyl, the plain view doctrine permitted them to utilize that evidence to obtain a valid search warrant, which they then used to obtain the fentanyl. Every step of the process was constitutional, so Petitioner's motion to suppress should be denied.

B. The Thirteenth Circuit Properly Decided That the Court's Holding in *Riley* Does Not Extend to the Automobile Exception

The Thirteenth Circuit appropriately disposed of Petitioner's argument that the holding in *Riley v. California*, 573 U.S. 373 (2014), should be extended to the automobile exception context. This Court invalidated the officers' warrantless search in *Riley* under the search incident to arrest exception. *Riley*, 575 U.S. at 403. As established, the officers seized Petitioner's SVR data pursuant to the automobile exception. This Court has consistently noted that the rules and precedent governing the automobile exception to the Fourth Amendment and the search incident to arrest exception to the Fourth Amendment are inherently distinguishable. As such, there is no reason that the holding from a case involving one exception should automatically extend to cases

involving the other. Moreover, the two exceptions are grounded in distinct policy justifications which this Court must consider when ruling on a new application of the respective exception. The policy justifications underlying the automobile exception were not considered in *Riley* nor do they support extending *Riley* to the present case.

The policies underpinning the automobile exception since its inception are still relevant today, even with advances in technology: citizens still have a lower expectation of privacy while in their vehicles due to the pervasive regulation of vehicles when used on public roadways, and the ready mobility of vehicles still makes enforcement of the warrant requirement quite difficult. *See California v. Carney*, 471 U.S. 386, 391 (1985). Because these rationales, when in play, broadly justify an officer's search of a vehicle without a warrant, the officer's search of Petitioner's Cadillac falls under the automobile exception. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018).

1. The Search Incident to Arrest Exception and Automobile Exception Are Fundamentally Different, and Rules That Apply to One Do Not Automatically Apply to the Other

The search incident to arrest exception and the automobile exception are independent doctrines. *See Arizona v. Gant*, 556 U.S. 332, 346–47 (2009); *United States v. Ross*, 456 U.S. 798, 816–17 (1982) (discussing how there is a difference between automobile cases and other warrantless search cases). In *Gant*, this Court declined the opportunity to blur the lines between the two exceptions by refusing to allow the warrantless search of a vehicle pursuant to the search incident to arrest exception. *Gant*, 556 U.S. at 344–45. Extending the search incident to arrest exception was unnecessary because the automobile exception ensures that officers can search a vehicle when the search is justified. *Id.* at 346–47.

This Court has consistently held that the automobile exception grants officers broader authority to search without a warrant than the search incident to arrest exception. The automobile

exception "allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized [by the exception] is broader." *Gant*, 556 U.S. at 347. Searches incident to arrest, on the other hand, are limited to evidence specific to the offense for which an individual is being arrested. *See Preston v. United States*, 376 U.S. 364, 367 (1964) (noting that officers can seize evidence relating to a crime but the scope of the search ends where it is too remote in time or place from the arrest). Moreover, "the exception for searches incident to arrest d[oes] not justify a search" of a vehicle's trunk absent exigent circumstances. *Riley*, 573 U.S. at 402 (citing *United States v. Chadwick*, 433 U.S. 1 (1977)). However, officers only need probable cause to search a vehicle's truck under the automobile exception because the mobility of an automobile is an exigent circumstance in and of itself. *California v. Carney*, 471 U.S. 386, 391 (1985). Because the automobile exception is continually construed more broadly than the search incident to arrest exception, this Court should avoid narrowing the automobile exception's scope by applying *Riley* here.

This Court's differing treatment of the two exceptions extends to searches of containers: the application of the automobile exception to a warrantless search of a container is analyzed differently than the application of the search incident to arrest exception in the same circumstance. *Ross*, 456 U.S. at 823. Thus, this Court does not assume that a determination of the constitutionality of a warrantless search incident to arrest will automatically lead to the same conclusion about the constitutionality of a container searched under the automobile exception. *Id.* And this Court explicitly declined to extend *Riley* to other exceptions to the warrant requirement. *See Riley*, 573 U.S. at 388. As it relates to whether an exception applies to cell phones, the Court explicitly noted that "even though the search incident to arrest exception does not apply. . . other case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at 401–02. This clearly

shows that cell phones are not immune from all warrantless searches, only from warrantless searches incident to arrest. If cell phones are not decisively immune from warrantless searches under the automobile exception, there is no reason *Riley* should apply to the search of Petitioner's vehicle and the on-board computer.

This Court cabined *Riley* and its reasoning solely to cell phones and to the search-incident-to-arrest context. Here, Petitioner's vehicle and the data within was searched under the automobile exception. As the Thirteenth Circuit noted, lower courts have found that the automobile exception applies to a range of electronic devices, including cell phones. R. at 16–17; *see United States v. Davis*, 787 F. Supp. 2d 1165, 1171 (D. Or. 2011) ("Cell phones may be searched for . . . data pursuant to the automobile exception to the warrant requirement."); *Mobley v. State*, 834 S.E.2d 785, 793 n.10 (Ga. 2019) (noting that the automobile exception could allow for the retrieval of data from a car's airbag control module). This Court's automobile-exception precedent should not be abrogated because of a decision grounded in an entirely different context. Rather, the overwhelming precedent supports distinguishing this case from *Riley* and continuing to broadly apply the automobile exception. Thus, the warrantless search of Petitioner's vehicle and the data locally stored within it was valid, and Petitioner's motion to suppress must be denied.

2. <u>The Divergent Policy Justifications of Automobile Exception and the Search Incident to Arrest Exception Discourage the Automatic Transfer of Rules Between the Two</u>

Riley does not address the dual-policy justifications underpinning the automobile exception, so the societal interests served by the automobile exception would not be advanced by extending *Riley*. In fact, *Riley* relied on the policy concerns underlying the search incident to arrest exception, rather than the policy concerns which form the bedrock of the automobile exception.[1]

[1] The policy concerns relevant to searches incident to arrest, as outlined in *Chimel v. California* are potential harm to officers and the potential destruction of evidence. 395 U.S. 752, 763 (1969). Neither of these concerns have been traditionally associated with the automobile

Riley, 573 U.S. at 386. Consequently, there is no reason that the Court's holding in *Riley* should apply in the automobile-exception context without evaluating the automobile exception's proper policy considerations.

As discussed, the automobile exception exists because vehicles are readily movable, making evidence easily and quickly removable from the scene before a warrant can be secured. *Carroll*, 267 U.S. at 153. *Carney* further justified using the automobile exception because citizens have a reduced expectation of privacy while in their vehicle. *Carney*, 471 U.S. at 391–92. Citizens accept this reduction in their privacy when they choose to travel on public roads where vehicles are subject to pervasive regulation. *Cady v. Dombrowski*, 413 U.S. 433, 440–41 (1973). Because of the importance of these policy concerns, the automobile exception has a broader scope than other warrantless-search exceptions. Given that different policy rationales justify the different Fourth Amendment exceptions, each exception is subject to different rules and limits. *Riley*, 573 U.S. at 401–02. For example, "[w]hat is reasonable for vehicles is different from what is reasonable for homes," *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021), and exigent circumstances may justify a search that is unjustifiable under the search incident to arrest exception. *United States v. Chadwick*, 433 U.S. 1, 15 n.9 (1977). Since each exception differs in scope and applicable circumstances, what is reasonable for one is different than what is reasonable for another. Thus, this Court should not blindly import one exception's precedent into another's without performing the requisite analysis.

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exception, although the potential destruction of evidence is present in this case as SVR data could readily be deleted.

3. Searches of Electronic Devices in Vehicles Are Justified by the Foundational Policy Considerations of the Automobile Exception

The policy justifications underlying the automobile exception determine the exception's scope. *See Collins v. Virginia*, 138 S. Ct. 1663, 1669–70 (2018) (declining to extend the automobile exception to encompass search of a vehicle in a home because doing so would go against the underlying justifications of the exception); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (utilizing the *Carroll* and *Carney* justifications to hold that the warrantless search did not violate the Fourth Amendment). Specifically, "[i]f a car is readily mobile and probable cause exists . . . the Fourth Amendment thus permits police to search the vehicle without more." *Labron*, 518 U.S. at 940. Therefore, the broadened application of the automobile exception as compared to other Fourth Amendment warrant exceptions necessitates a consideration of the pertinent policy justifications.

The justifications for the automobile exception, when applied to the search of Petitioner's vehicle and on-board computer, clearly validate the officer's warrantless search. Petitioner's vehicle was still operable at the time of the search, as shown by Petitioner's ability to pull over on the side of the road after the accident. R. at 5. Given that the computer is built into the vehicle, if the vehicle had been driven away, Petitioner could have easily erased the data contained on the computer, thus permanently removing any potential evidence of Petitioner's wrongdoing. Therefore, the officers were reasonably concerned that the vehicle could be quickly moved beyond the jurisdiction of law enforcement. This is precisely the situation that the automobile exception aims to prevent. *Carroll*, 267 U.S. at 153. The automobile exception protects against these risks, and clearly should be extended to electronic devices within the vehicle.

Because the search occurred on a public roadway, Petitioner had a decreased expectation of privacy because he consented to heavy government regulation of his vehicle. *Carney*, 471 U.S.

at 392. As the Thirteenth Circuit noted, on-board computers are also independently regulated. R. at 17; *see* Driver Privacy Act of 1994, 49 U.S.C. § 30101. Because Petitioner knew that both his vehicle and the data-collection device it contained were subject to extensive federal regulation, he had a lessened expectation of privacy in both. Thus, the officers validly searched Petitioner's vehicle and the on-board computer under the automobile exception.

Riley did not consider the policy justifications that this Court has held are imperative to justify considering a new application of the automobile exception. Thus, *Riley*'s holding cannot be relevant to this case. Because there are significant differences between the automobile exception and searches incident to arrest, it is improper to extend rules from one framework to the other. Rather, a review of policy justifications for the automobile exception support extending the automobile exception to electronic devices, like the SVR in Petitioner's vehicle. Therefore, this Court should affirm the Thirteenth Circuit's decision and reject the extension of *Riley* into this new context.

C. Even If Riley is Extended to the Automobile Exception, Law Enforcement's Search of the On-board Computer Was Constitutional Because It is Not a Cell Phone

As considered above, the holding of Riley should not extend to cases involving the automobile exception given the drastic differences between it and the search incident to arrest exception. However, even if this Court were to extend the holding of Riley to the context of the automobile exception, Petitioner's motion to dismiss should still be denied as the search of the vehicle's on-board computer is valid under Riley. Riley's narrow holding pertains only to the invalidity of warrantless searches of cell phones when performed incident to arrest. It does not, however, broadly ban such searches for all electronic devices, and such an expansion of that holding should only be done through the legislative process. The on-board computer only stores files locally, without any ability to search through information located elsewhere in the 'cloud.'

Thus, the vehicle's computer is far more like a glove box than a cell phone, which is still a searchable container under Riley. Given that the vehicle's on-board computer is not a cell phone, Riley does not apply here.

1. The Vehicle's Computer Does Not Resemble a Cell Phone Given Its Limited Storage and Access Capabilities

In *Riley*, this Court expressed serious concerns over the privacy interests at stake when determining whether a cell phone could be searched without a warrant. 573 U.S. at 393–99. Chief among those concerns was the fact that a cell phone can provide access to data that is not stored on the device itself. *Id.* at 397. This Court noted that "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity." *Id.* at 393. The unique storage capabilities of smartphones pose distinct privacy anxieties that are not present in other electronic devices. For example, a vehicle's on-board computer does not present the same type of privacy concerns, given its relatively limited storing and data-accessing capabilities. Any data collected by an SVR is only accessible locally through the vehicle's on-board computer. There is no access to the 'cloud' nor other information that was not directly obtained by the SVR.

Whereas several courts have expressed concern over the limitless amount of information that could be obtained when searching a cell phone, the Berla device could only obtain data from the on-board computer comparable to that obtained by opening a glove box. *See, e.g.*, *Schlossberg v. Solesbee*, 844 F. Supp. 2d 1165, 1169 (D. Or. 2012) (noting that the limitless nature of an electronic device's storage and access to information was a key factor in finding that a cell phone is not a container). The search in *Riley* allowed officers "to access data located elsewhere, at the tap of a screen." *Riley*, 573 U.S. at 397. By contrast, the limited information-storing technology of on-board computers only allows Berla devices to pull data stored on the computer. Thus, a search of a car's on-board computer fails to implicate the risks at the heart of this Court's holding in *Riley.*

Given the vast amount of data that can be accessed through a cell phone, treating cell phones differently than other electronic devices satisfies the privacy concerns underlying the Fourth Amendment and preserves law enforcement's ability to search immediately when probable cause exists. *See United States v. Lichtenberger*, 786 F.3d 478, 487–88 (6th Cir. 2015) (noting that "the particular qualities of electronic devices . . . must be considered") (*citing Riley*, 573 U.S. at 393–94); Maddalena DeSimone, *Can We Curate It? Why Luggage and Smartphones Merit Different Treatment at the United States Border*, 2019 COLUM. BUS. L. REV. 696, 720–22 (proposing that smartphones be treated differently than other electronic devices given their distinct prevalence in society and their range of uses). The search of Petitioner's vehicle's on-board computer does not implicate *Riley*'s paramount concern that officers cannot differentiate between cellphone data stored locally versus pulled from the cloud. *See Riley* at 397–98 (citing lack of a satisfactory alternative to prevent the search of cloud data as "yet another reason that the privacy interests here" command a different result than previous cases). Given the fact that Berla devices only pull locally stored data, there is no concern over law enforcement's ability to distinguish between locally-stored and cloud-stored data. This major difference warrants distinct treatment of cell phones and a vehicle's on-board computer.

2. Congress Must Determine Whether the Holding in *Riley* Warrants Extension

The *Riley* Court focused on the pervasiveness of cell phones in modern life, a prevalence specific to cell phones and not applicable to other, less common electronic devices. Reading *Riley* to encompass different types of electronic devices would be an expansion of that holding beyond what this Court initially decided in the case. This Court is not equipped with the information gathering capabilities necessary to discern which electronic devices can and cannot be subject to

warrantless search. Rather, policy determinations regarding how technological developments impact the privacy interests of citizens should be left to Congress.

At its core, the automobile exception balances the privacy interests of citizens and the legitimate needs of law enforcement to investigate crimes. *See Carney*, 471 U.S. at 391. Our system of checks and balances provides Congress with the ability to react to this Court's rulings through legislation. If elected officials determine that the competing interests of individual privacy and law-enforcement needs require an expansion (or retraction) of the holding in *Riley*, then such a change should certainly be made. However, it is the role of Congress and not the Court to make this determination. *See Riley*, 573 U.S. at 407–08 (Alito, J. concurring) (encouraging Congressional or state legislative action to reconsidering or alter the holding in *Riley*).

Historically it has been Congress, and not the Court, that determines how best to balance privacy interests and law enforcement needs. *See id.* at 408 (Alito, J. concurring) (discussing how Congress enacted legislation in response to the holding in *Katz v. United States*, 389 U.S. 347, 353–59 (1967), which now predominantly governs the area of electronic surveillance). The legislative process is better equipped to assess any extension of Fourth Amendment protections because of its adaptability and ability to obtain information from a wider range of voices. *See United States v. Touset*, 890 F.3d 1227, 1236–37 (11th Cir. 2018) (asserting that in the context of the Fourth Amendment, Congress must be allowed to design the appropriate standard); Orinn S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1120**,** 1120 (2017). If Congress, after weighing the concerns underlying *Riley*, found that *Riley*'s restrictions should extend to other electronic devices, then it could enact legislation to that effect. However, in the absence of such legislation, the Court's holding in *Riley* should remain limited to cell phones.

Because the vehicle's on-board computer cannot be classified as a cell phone nor does it possess the same storage capabilities underpinning the policy concerns in *Riley*, the search of the computer is valid under *Riley*. Because judicial restraint, coupled with this Court's precedents, caution against expanding *Riley*, this Court should affirm the Thirteenth Circuit's decision and deny Petitioner's motion to suppress.

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Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/ Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Morris Tyler Moot Court of Appeals**

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